Tetuan Wan Shahrizal, Hari & Co v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(L)-101–09 OF 2020(C)
ABDUL RAHMAN SEBLI CJ (SABAH AND SARAWAK), HASNAH HASHIM AND MARY LIM FCJJ
31 JANUARY 2023

Criminal Procedure — Forfeiture — Properties seized under Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('Act') — Application by respondent to forfeit seized properties — Appellant claimed its legal fees to be paid from seized properties — High Court held to be bound by Court of Appeal's unwritten decision which allowed claim for legal fees to be paid from seized properties — Whether High Court bound by stare decisis to follow unwritten decision — Whether appellant had legitimate legal interest in properties — Whether appellant was bona fide third party — Whether legal fees could be paid from seized properties — Whether s 44 of Act was applicable — Whether action under s 56(1) of Act had been wrongly instituted

On 9 June 2016, a police investigation was carried out against Amar Asyraf bin Zolkepli ('Amar') for offences under ss 124 and 130 of the Penal Code and s 5 of the Computer Crimes Act 1997. The investigation revealed that Amar possessed a computer software which enabled access to the MYIMM system of the Immigration Department without the need for a password or fingerprint. Amar then provided the software to a syndicate which used it to unlawfully approve the 'Pas Penggajian Pengurusan Pegawai Dagang' and 'Pas Penggajian Pegawai Dagang'. He would be paid RM1,000 for every such approval. In a follow-up action, the public prosecutor ('the respondent') on behalf of the Federal Government issued a seizing order pursuant to ss 50(1) and 51(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act') against the properties belonging to Amar. Subsequently, and having satisfied himself that the properties were proceeds of an unlawful activity, the respondent applied to the High Court for forfeiture of the properties under s 56(1)(c) of the Act. On its part the appellant, in purported exercise of its rights as a bona fide third party under s 61(4) of the Act, claimed a sum of RM398,722 from the seized properties which the respondent intended to forfeit. The basis for the claim was that it had a legitimate legal interest in the RM398,722, being legal fees for the legal services that it rendered to Amar from the day he was detained by the police up to the time of the forfeiture proceedings under s 56(1) of the Act. The appellant's claim was allowed by the learned judge of the High Court premised on the grounds: (a) the appellant had a right under art 5(3) of the Federal Constitution ('the FC') to represent Amar and therefore entitled to its legal

fees; (b) the appellant had proved that it was the law firm representing Amar; (c) the appellant's claim for the RM398,722 in legal fees was supported by oral and documentary evidence, ie the bills that the appellant firm issued to Amar; and (d) the learned judge was bound by the decision of the Court of Appeal in *Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya* Criminal Appeal No W-09–432–11 of 2016 (unreported) ('Md Sukri') where the facts were similar. However, the Court of Appeal reversed the decision of the High Court. Hence, this appeal.

Held, by majority, dismissing the appeal:

(1) **(per Abdul Rahman Sebli CJ (Sabah and Sarawak), majority)** The learned judge was wrong in holding that he was bound by stare decisis to follow the decision of the Court of Appeal in *Md Sukri* which allowed the claims by several law firms for their legal fees to be paid from seized properties. There were no written grounds delivered by the Court of Appeal in that case. Without the benefit of the written grounds, there was no way that the learned judge could have known of the actual reason or reasons why the Court of Appeal decided the way it did. Where there were no grounds written, there was no point or principle of law that could officially be decided or settled by the ruling of a competent court. The learned judge would not have been in breach of stare decisis if he had chosen not to follow the decision of the Court of Appeal in *Md Sukri* (see paras 11–12, 19 & 23).

(2) **(per Abdul Rahman Sebli CJ (Sabah and Sarawak), majority)** There was a serious misdirection by way of non-direction when the learned judge ruled that the bills produced by the appellant were sufficient proof that it was a bona fide third party and therefore entitled to the RM398,722 seized from Amar, the which rendered the judgment defective and liable to be set aside. The bills that the appellant produced in support of its claim were not proof that it was a bona fide third party and had a legitimate legal interest in the RM398,722. Unquestionably the RM398,722 was money owing to the appellant by Amar, which he was at liberty to pay using any property at his disposal but not from the seized property. Illegal property did not become legal property by using it to pay legal fees (see paras 24–26).

(3) **(per Abdul Rahman Sebli CJ (Sabah and Sarawak), majority)** In proceedings under s 61(4) of the Act, the burden was on the person claiming to be a bona fide third party and having a legitimate legal interest in the property to show cause as to why the property should not be forfeited. The burden had not been discharged by the appellant as no such evidence was produced before the court save for the bills charged to Amar as legal fees, which merely showed that Amar owed that sum of money to the appellant (see paras 30 & 32).

(4) **(per Abdul Rahman Sebli CJ (Sabah and Sarawak), majority)** The appellant's argument ie as an officer of the court, a lawyer was a bona fide third party, suggested that being a bona fide third party by default (as an officer of the court), a lawyer was entitled to be paid his legal fees using property seized under s 50(1) and 51(1) of the Act without having to show cause under s 61(4) of the Act as to why the property should not be forfeited but to be released to him as a matter of right. This would render s 56(2)(a) of the Act completely redundant and bereft of all meaning, a major impediment to the Government's effort to combat money laundering, as illegal money seized under the Act could then be cleansed by using it to pay for lawyers fees (see paras 35–36).

(5) **(per Abdul Rahman Sebli CJ (Sabah and Sarawak), majority)** The guaranteed fundamental right to be represented by counsel of one's choice under art 5(3) of the FC had no bearing on the issue before the court, which was whether the counsel of one's choice was entitled to be paid his legal fees using money that was the proceeds of an unlawful activity. For this reason, the appellant's contention that the Court of Appeal's interpretation of s 61(4) of the Act had rendered the right to counsel illusory was a total misconception and failure to comprehend the purpose behind the forfeiture provisions (see paras 46–47).

(6) **(per Abdul Rahman Sebli CJ (Sabah and Sarawak), majority)** Section 44 of the Act had no application as the provision dealt with the freezing of property and not with forfeiture. It had no application to proceedings for forfeiture under s 56(1) of the Act, nor to proceedings for the return of seized property by third parties under s 61(4) of the Act. Under ss 56(1) and 61(4) of the Act, no criminal proceedings were instituted against any person for any serious offence or foreign serious offence. Therefore, where a person was not on trial for a serious offence or foreign serious offence, the question of payment of costs by the person whose property was frozen to defend criminal proceedings against him as contemplated by s 44(3)(c) of the Act did not arise in proceedings under s 61(4) of the Act. No criminal proceedings had been instituted against Amar under the Act and he was not on trial for any serious offence or foreign serious offence (see paras 49–50 & 52–53).

(7) **(per Abdul Rahman Sebli CJ (Sabah and Sarawak), majority)** There was no substance to the appellant's argument ie the Court of Appeal failed to take into account the fact that Amar was detained under the Prevention of Crime Act 1959 and was released by way of a habeas corpus application, which according to the appellant showed that criminal proceedings had been instituted against Amar and thus, an action for forfeiture against him under s 56(1) of the Act was unlawful, as s 56(1) of the Act spoke of 'prosecution' or 'conviction' and not 'criminal proceedings' (see paras 57–58).

(8) **(per Mary Lim FCJ, dissenting)** The existence of s 61 of the Act meant that the court could not proceed to order a forfeiture until and unless third party rights, interests or claims were determined. To say that the purpose of the Act was to forfeit properties which were proceeds of unlawful activity and say that persons such as the appellant were therefore not entitled to their interests or rights because of that purpose was to deprive or deny these bona fide third parties of their larger and wider interests under art 13 read with art 5 of the FC in this case. Section 61 of the Act was specifically enacted to provide for non-forfeiture or return properties to bona fide third parties despite such properties being proven to be proceeds of unlawful activity (see para 119).

(9) **(per Mary Lim FCJ, dissenting)** The appellant was entirely a bona fide third party with interest in the property. It had perfectly valid, legal and real interests which were entirely legitimate. It was incongruous to on the other one hand say, as the Court of Appeal did, agreeing with the public prosecutor that the appellant was not a bona fide third party, and yet suggested that the appellant may make its claim against Amar for unpaid legal services as an action in personam with no proprietary interest attached to the properties. Where a third party was claiming for a return of the property seized, the conditions set out in s 61(4) of the Act must be fulfilled. The same could not be said about the appellant who was not and could not be claiming for a return of any of the seized properties as these properties were never seized from them. All that a third party such as the appellant was required to establish was to 'show cause as to why the property shall not be forfeited.' The appellant, as such a third party, must do so on a balance of probabilities. The appellant had met that burden and had shown cause why the sum of RM398,722 should not be forfeited (see paras 118, 128 & 135).

(10) **(per Mary Lim FCJ, dissenting)** Where properties were frozen by an enforcement agency, s 44(3)(c) of the Act provided for the disposal of properties of monies for the payment of legal expenses. Since there was provision for properties which were frozen to be disposed of in order to pay legal fees, it could not be seen why legal expenses could not be claimed and paid up from seized properties when forfeiture was initiated, especially where the basis for freezing, seizure and forfeiture were the same, that was, proceeds of unlawful activities (see para 138).

(11) **(per Mary Lim FCJ, dissenting)** Amar was entitled to legal representation of his choice as guaranteed under art 5 of the FC. Even with a wide and liberal reading which was how the FC must be read and interpreted, it could not be said nor could it ever be the interpretation of art 5 of the FC that legal representation to an accused must be rendered pro bono and that any counsel providing such legal services could not and would not be paid should his client's monies lied in accounts frozen

or seized, liable to be forfeited. The reading by the Court of Appeal was in essence literal without examining the whole purport of the Act; resulting in the guaranteed rights in Part II of the FC, quite illusory to the accused. Unless voluntarily waived, there was an implied obligation to pay for such legal services and the counsel representing an accused in the circumstances of Amar had every legitimate expectation to be remunerated. The reading by the Court of Appeal had also gravely and adversely affected the rights of the appellant to a meaningful livelihood; that its legal representation of Amar would not and could not receive remuneration (see paras 140–142).

(12) **(per Mary Lim FCJ, dissenting)** Further, it could not be right that just because s 61(1) of the Act reserved the other rights of third parties to sue upon any contractual relationship or take any other alternative remedy that such third parties were then said to be not bona fides. The Act did not ever intend that third parties who were lawyers similarly circumstanced as the appellant could never be paid their legal fees (see para 143).

[Bahasa Malaysia summary

Pada 9 Jun 2016, siasatan polis telah dijalankan terhadap Amar Asyraf bin Zolkepli ('Amar') atas kesalahan di bawah ss 124 dan 130 Kanun Keseksaan dan s 5 Akta Jenayah Komputer 1997. Siasatan mendapati Amar memiliki perisian komputer yang membolehkan akses kepada sistem MYIMM Jabatan Imigresen tanpa memerlukan kata laluan atau cap jari. Amar kemudiannya memberikan perisian itu kepada sindiket yang menggunakannya untuk meluluskan 'Pas Penggajian Pengurusan Pegawai Dagang' dan 'Pas Penggajian Pegawai Dagang' secara tidak sah. Dia akan dibayar RM1,000 untuk setiap kelulusan itu. Dalam tindakan susulan, pendakwa raya ('responden') bagi pihak Kerajaan Persekutuan mengeluarkan perintah penyitaan menurut ss 50(1) dan 51(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Akta Hasil daripada Aktiviti Haram 2001 ('Akta') terhadap harta kepunyaan Amar. Selepas itu, dan setelah berpuas hati bahawa harta itu adalah hasil daripada aktiviti haram, responden memohon kepada Mahkamah Tinggi untuk melucuthakan harta di bawah s 56(1)(c) Akta. Bagi pihak perayu, dalam melaksanakan haknya sebagai pihak ketiga yang suci hati di bawah s 61(4) Akta, menuntut sejumlah RM398,722 daripada harta yang disita yang responden ingin melucuthakan. Asas untuk tuntutan itu ialah ia mempunyai kepentingan sah di sisi undang-undang dalam RM398,722, sebagai yuran guaman untuk perkhidmatan guaman yang diberikannya kepada Amar dari hari dia ditahan oleh polis sehingga masa prosiding pelucuthakan di bawah s 56(1) Akta. Tuntutan perayu dibenarkan oleh hakim Mahkamah Tinggi yang bijaksana berdasarkan alasan: (a) perayu mempunyai hak di bawah perkara 5(3) Perlembagaan Persekutuan ('PP') untuk mewakili Amar dan oleh itu berhak menerima yuran guamannya; (b) perayu telah

membuktikan bahawa ia adalah firma guaman yang mewakili Amar; (c) tuntutan perayu untuk yuran guaman RM398,722 disokong oleh keterangan lisan dan dokumentari, iaitu bil yang dikeluarkan oleh firma perayu kepada Amar; dan (d) hakim yang bijaksana terikat dengan keputusan Mahkamah Rayuan dalam *Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya* Criminal Appeal No W-09–432–11 of 2016 (unreported) ('Md Sukri') di mana faktanya adalah serupa. Walau bagaimanapun, Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi. Oleh itu, rayuan ini.

Diputuskan, dengan majoriti, menolak rayuan:

(1) **(oleh Abdul Rahman Sebli KH (Sabah dan Sarawak), majoriti)** Hakim yang bijaksana khilaf apabila memutuskan bahawa beliau terikat dengan stare decisis untuk mengikuti keputusan Mahkamah Rayuan di *Md Sukri* yang membenarkan tuntutan beberapa firma guaman untuk yuran guaman mereka dibayar daripada harta yang disita. Tiada alasan bertulis yang dikemukakan oleh Mahkamah Rayuan dalam kes itu. Tanpa bantuan alasan bertulis, tidak mungkin hakim yang bijaksana dapat mengetahui sebab atau sebab-sebab sebenar Mahkamah Rayuan memutuskan seperti itu. Jika tiada alasan bertulis, tidak ada titik atau prinsip undang-undang yang boleh diputuskan atau diselesaikan secara rasmi melalui keputusan mahkamah yang layak. Hakim yang bijaksana tidak akan melanggar stare decisis jika beliau memilih untuk tidak mengikut keputusan Mahkamah Rayuan di *Md Sukri* (lihat perenggan 11, 12, 19 & 23).

(2) **(oleh Abdul Rahman Sebli KH (Sabah dan Sarawak), majoriti)** Terdapat salah arah yang serius dengan cara ketidakpatuhan apabila hakim yang bijaksana memutuskan bahawa bil yang dikemukakan oleh perayu adalah keterangan yang mencukupi bahawa ia adalah satu pihak ketiga yang suci hati dan oleh itu berhak menerima RM398,722 yang disita daripada Amar, yang menyebabkan penghakiman itu cacat dan boleh diketepikan. Bil-bil yang dikemukakan oleh perayu untuk menyokong tuntutannya bukanlah keterangan bahawa ia adalah pihak ketiga yang suci hati dan mempunyai kepentingan sah di sisi undang-undang dalam RM398,722. Tidak dinafikan RM398,722 adalah wang terhutang kepada perayu oleh Amar, yang dia bebas membayar menggunakan mana-mana harta yang ada padanya tetapi bukan daripada harta yang disita. Harta haram tidak menjadi harta sah dengan menggunakannya untuk membayar yuran guaman (lihat perenggan 24-26).

(3) **(oleh Abdul Rahman Sebli KH (Sabah dan Sarawak), majoriti)** Dalam prosiding di bawah s 61(4) Akta, beban adalah pada orang yang mendakwa sebagai pihak ketiga yang suci ahti dan mempunyai kepentingan sah di sisi undang-undang dalam harta untuk menunjukkan

A sebab mengapa harta itu tidak boleh dilucuthakkan. Beban itu tidak dilepaskan oleh perayu kerana tiada keterangan sedemikian dikemukakan di hadapan mahkamah kecuali bil yang dikenakan kepada Amar sebagai yuran guaman, yang hanya menunjukkan bahawa Amar berhutang sejumlah wang itu kepada perayu (lihat perenggan 30 & 32).

B (4) **(oleh Abdul Rahman Sebli KH (Sabah dan Sarawak), majoriti)** Hujahan perayu iaitu sebagai pegawai mahkamah, seorang peguam adalah pihak ketiga yang suci hati, mencadangkan bahawa seorang pihak ketiga yang suci hati secara default (sebagai pegawai mahkamah), seorang C peguam berhak untuk dibayar yuran guamannya menggunakan harta yang disita di bawah s 50(1) dan 51(1) Akta tanpa perlu menunjukkan sebab di bawah s 61(4) Akta tentang mengapa harta itu tidak boleh dilucuthakkan tetapi harus diserahkan kepadanya sebagai hak. Ini akan menjadikan s 56(2)(a) Akta berlebihan sepenuhnya dan kehilangan D semua makna, sebagai penghalang utama kepada usaha Kerajaan untuk memerangi pengubahan wang haram, kerana wang haram yang disita di bawah Akta itu kemudiannya boleh dibersihkan dengan menggunakannya untuk membayar untuk yuran peguam (lihat perenggan 35 & 36).

E (5) **(oleh Abdul Rahman Sebli KH (Sabah dan Sarawak), majoriti)** Hak asasi yang dijamin untuk diwakili oleh peguam pilihan seseorang di bawah perkara 5(3) PP tidak mempunyai kaitan dengan isu di hadapan mahkamah, iaitu sama ada peguam pilihan seseorang itu berhak untuk F dibayar yuran guamannya menggunakan wang yang merupakan hasil daripada aktiviti haram. Atas sebab ini, dakwaan perayu bahawa tafsiran Mahkamah Rayuan terhadap s 61(4) Akta telah menjadikan hak untuk peguam sebagai khayalan adalah salah tanggapan dan kegagalan untuk memahami tujuan di sebalik peruntukan pelucuthakan (lihat perenggan G 46 & 47).

(6) **(oleh Abdul Rahman Sebli KH (Sabah dan Sarawak), majoriti)** Seksyen 44 Akta itu tidak terpakai kerana peruntukan itu berkenaan pembekuan harta dan bukan dengan pelucuthakan. Ia tidak terpakai untuk prosiding bagi pelucuthakan di bawah s 56(1) Akta, mahupun H prosiding untuk pemulangan harta yang disita oleh pihak ketiga di bawah s 61(4) Akta. Di bawah ss 56(1) dan 61(4) Akta, tiada prosiding jenayah dimulakan terhadap mana-mana orang bagi sebarang kesalahan berat atau kesalahan berat asing. Oleh itu, jika seseorang itu tidak dibicarakan untuk kesalahan berat atau kesalahan berat asing, persoalan I pembayaran kos oleh orang yang hartanya dibekukan untuk membela prosiding jenayah terhadapnya seperti yang dipertimbangkan oleh s 44(3)(c) Akta tidak timbul dalam prosiding di bawah s 61(4) Akta. Tiada prosiding jenayah telah dimulakan terhadap Amar di bawah Akta dan dia tidak dibicarakan untuk sebarang kesalahan berat atau kesalahan

berat asing (lihat perenggan 49, 50, 52 & 53).

(7) **(oleh Abdul Rahman Sebli KH (Sabah dan Sarawak), majoriti)** Tiada dasar kepada hujahan perayu iaitu Mahkamah Rayuan gagal mengambil kira hakikat bahawa Amar telah ditahan di bawah Akta Pencegahan Jenayah 1959 dan telah dibebaskan melalui permohonan habeas corpus, yang menurut perayu menunjukkan bahawa prosiding jenayah telah dimulakan terhadap Amar dan dengan itu, tindakan pelucuthakan terhadapnya di bawah s 56(1) Akta adalah menyalahi undang-undang, kerana s 56(1) Akta menyatakan tentang 'pendakwaan' atau 'sabitan' dan bukannya 'prosiding jenayah' (lihat perenggan 57 & 58).

(8) **(oleh Mary Lim HMP, menentang)** Kewujudan s 61 Akta bermakna mahkamah tidak boleh meneruskan untuk memerintahkan pelucuthakan sehingga dan melainkan hak pihak ketiga, kepentingan atau tuntutan ditentukan. Untuk mengatakan bahawa tujuan Akta adalah untuk melucutkan harta yang merupakan hasil daripada aktiviti haram dan mengatakan bahawa orang seperti perayu oleh itu tidak berhak kepada kepentingan atau hak mereka kerana tujuan itu adalah melucutkan atau menafikan pihak ketiga yang suci hati ini daripada kepentingan mereka yang lebih besar dan lebih luas di bawah perkara 13 dibaca dengan perkara 5 PP dalam kes ini. Seksyen 61 Akta secara khusus digubal untuk memperuntukkan harta yang tidak dilucuthakkan atau pengembalian harta kepada pihak ketiga yang suci hati walaupun harta tersebut terbukti sebagai hasil daripada aktiviti haram (lihat perenggan 119).

(9) **(oleh Mary Lim HMP, menentang)** Perayu adalah sepenuhnya pihak ketiga yang suci hati yang mempunyai kepentingan dalam harta itu. Ia mempunyai kepentingan yang sah dan benar yang sepenuhnya sah. Adalah tidak sesuai untuk di satu pihak yang lain mengatakan, seperti yang dilakukan oleh Mahkamah Rayuan, bersetuju dengan pendakwa raya bahawa perayu bukanlah pihak ketiga yang suci hati, namun mencadangkan bahawa perayu boleh membuat tuntutannya terhadap Amar untuk perkhidmatan guaman yang tidak dibayar sebagai tindakan in personam tanpa kepentingan proprietari yang terikat pada harta. Jika pihak ketiga menuntut pemulangan harta yang disita, syarat yang dinyatakan dalam s 61(4) Akta mesti dipenuhi. Perkara yang sama tidak boleh diperkatakan mengenai perayu yang tidak dan tidak boleh menuntut pemulangan mana-mana harta yang dirampas kerana harta ini tidak pernah dirampas daripada mereka. Apa yang diperlukan oleh pihak ketiga seperti perayu adalah untuk 'menunjukkan sebab mengapa harta itu tidak boleh dilucuthakkan.' Perayu, sebagai pihak ketiga, mesti berbuat demikian atas imbangan kebarangkalian. Perayu telah memenuhi beban itu dan telah menunjukkan sebab mengapa jumlah

RM398,722 tidak patut dilucuthakkan (lihat perenggan 118, 128 & 135).

(10) **(oleh Mary Lim HMP, menentang)** Jika hartanah dibekukan oleh agensi penguatkuasaan, s 44(3)(c) Akta memperuntukkan pelupusan harta wang untuk pembayaran perbelanjaan guaman. Memandangkan terdapat peruntukan untuk harta yang dibekukan untuk dilupuskan bagi membayar yuran guaman, tidak dapat dilihat mengapa bayaran guaman tidak boleh dituntut dan dibayar daripada harta yang disita apabila penyitaan dimulakan, terutamanya di mana asas pembekuan, penyitaan dan pelucuthakan adalah sama, iaitu hasil daripada aktiviti haram (lihat perenggan 138).

(11) **(oleh Mary Lim HMP, menentang)** Amar berhak mendapat representasi undang-undang pilihannya seperti yang dijamin di bawah perkara 5 PP. Walaupun dengan bacaan yang luas dan liberal yang merupakan cara PP mesti dibaca dan ditafsirkan, ia tidak boleh dikatakan dan tidak boleh menjadi tafsiran perkara 5 PP bahawa representasi undang-undang kepada tertuduh mesti diberikan secara pro bono dan bahawa sebarang peguam yang menyediakan perkhidmatan guaman sedemikian tidak boleh dan tidak akan dibayar sekiranya wang anak guamnya terdapat dalam akaun yang dibekukan atau disita, yang boleh dilucuthakkan. Bacaan oleh Mahkamah Rayuan pada dasarnya adalah literal tanpa meneliti keseluruhan maksud Akta tersebut; mengakibatkan hak terjamin dalam Bahagian II PP, merupakan ilusi kepada tertuduh. Melainkan diketepikan secara sukarela, terdapat kewajipan tersirat untuk membayar perkhidmatan guaman tersebut dan peguam yang mewakili tertuduh dalam keadaan ini Amar mempunyai semua jangkaan yang sah untuk dibayar. Pembacaan oleh Mahkamah Rayuan juga telah menjejaskan hak perayu untuk kehidupan bermakna; bahawa perwakilan undang-undang Amar tidak akan dan tidak boleh menerima bayaran (lihat perenggan 140–142).

(12) **(oleh Mary Lim HMP, menentang)** Tambahan pula, adalah tidak wajar hanya kerana s 61(1) Akta merizabkan hak lain pihak ketiga untuk mendakwa sebarang hubungan kontrak atau mengambil sebarang remedi alternatif lain bahawa pihak ketiga tersebut kemudiannya dikatakan bukan suci hati. Akta ini tidak sekali-kali bercadang bahawa pihak ketiga yang merupakan peguam mempunyai keadaan yang sama seperti perayu tidak boleh dibayar yuran guaman mereka (lihat perenggan 143).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780; [2019] 3 AMR 101, FC (refd)

Caplin & Drysdale v United States (1989) 491 US 617, SC (folld)

Centillion Environment & Recycling Ltd (formerly known as Citiraya Industries Ltd) v PP and others and another appeal [2013] 1 SLR 444; [2012] SGCA 65, CA (refd)
Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697; [1992] 1 CLJ Rep 72, SC (refd)
EL Chong Motor Trading Sdn Bhd (pihak ketiga yang menuntut) lwn Pendakwa Raya [2017] 11 MLJ 793; [2017] 3 CLJ 592, HC (refd)
Kamal Azam Borddin v Timbalan Menteri Dalam Negeri & Ors Criminal Appeal No 05(HC)-133–05 of 2018(B) (unreported) (refd)
Kedar Nath Singh v State of Bihar 1962 AIR 955, SC (refd)
ML Kamra v The Chairman-cum-Managing Director, New India Assurance Co Ltd and another (1992) 2 SCC 36, SC (refd)
Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo [2020] 1 MLJ 440; [2019] 10 CLJ 731, FC (refd)
Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya Criminal Appeal No W-09–432–11 of 2016 (unreported), CA (not folld)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
PP v Billion Nova Sdn Bhd & Ors [2016] MLJU 1823; [2016] 2 CLJ 763; [2016] AMEJ 0162, CA (refd)
PP v Azmi bin Sharom [2015] 6 MLJ 751; [2015] 8 CLJ 921; [2015] 6 AMR 338, FC (refd)
PP v Gan Boon Aun [2017] 3 MLJ 12; [2017] 4 CLJ 41; [2017] 3 AMR 164, FC (refd)
PP v Kuala Dimensi Sdn Bhd & Ors [2021] 2 MLJ 469; [2021] 3 CLJ 198; [2021] 2 AMR 113, FC (refd)
PP v Lau Kwai Thong MTSA Case No 44–20 of 2008 (unreported) (refd)
Pendakwa Raya lwn Raja Noor Asma bt Raja Harun [2013] 9 MLJ 181; [2013] 5 CLJ 656, HC (refd)
Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors [1971] 2 MLJ 30 (refd)
Pierson v Secretary of State for the Home Department [1997] 3 All ER 577, HL (refd)
Regina v Secretary of State for the Home Department, ex parte Simms and another [2000] 2 AC 115, HL (refd)
Teh Tek Soon lwn Pendakwa Raya [2015] MLJU 2212; [2015] 1 LNS 1504; [2015] MLRAU 433; [2015] MLRAU 433, CA (refd)
Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 1; [2019] 9 CLJ 177, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 s 3, 3(1), 4, 4(1), 28L(1), 44, 44(1)(b)(ii), (3)(c), 45(1), (2), (3), (4), 50(1), (1)(a), (1)(b), (1)(d), (1A), 51(1), (1)(c), (1A), 52A, 55, 55(1), 56, 56(1), (1)(a), (1)(b), (1)(c), (1)(d), (2), (2)(a), (3), (4), 60, 61, 61(1), (2), (3), (4), (4)(a), (4)(b), (4)(d),

A (4)(e), 70, 70(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), Parts I, II, III, IV, IVA, VI, VIA, VII
Computer Crimes Act 1997 s 5
Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 [SG] ss 2(1), 13(1), (2)
B Federal Constitution arts 5, 5(1), (3), 13, Part II
Penal Code ss 124, 130V
Prevention of Crime Act 1959 ss 7, 19A(1)
Prevention of Crime Act 1998 [SA]
Security Offences (Special Measures) Act 2012

C

Appeal from: *Deputy Public Prosecutor v Amar Asyraf bin Zolkepli (Public Islamic Bank Bhd, third party) (Messrs Wan Shahrizal, Hari & Co, intervener)* [2020] 12 MLJ 287 (Court of Appeal, Putrajaya)

D *Gopal Sri Ram (with Wan Shahrizal bin Wan Ladin, How Li Nee and Marcus Lee) (Wan Shahrizal, Hari & Co) for the appellant.*
Mohd Dusuki bin Mokhtar (with Mohd Khushairy bin Ibrahim) (Deputy Public Prosecutors, Attorney General's Chambers) for the respondent.

E **Abdul Rahman Sebli CJ (Sabah and Sarawak) (delivering majority judgment of the court):**

[1] This appeal concerns a claim by a law firm for its legal fees to be paid from money that has been seized under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the Act').

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[2] Having given careful consideration to the arguments of the parties, both written and oral, we dismissed the appeal by a majority decision. My learned sister Justice Hasnah Mohammed Hashim and I were in favour of dismissing the appeal and affirming the decision of the Court of Appeal whilst my learned sister Justice Mary Lim Thiam Suan was in favour of allowing the appeal and setting aside the decision of the Court of Appeal. These then are the majority grounds of decision.

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[3] The facts are simple and straightforward. On 9 June 2016, police investigation was carried out against one Amar Asyraf bin Zolkepli ('Amar') for offences under ss 124 and 130V of the Penal Code and s 5 of the Computer Crimes Act 1997. The investigation revealed that Amar possessed a computer software which enabled access to the MYIMM system of the Immigration Department without the need for a password or fingerprint.

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[4] Amar then provided the software to a syndicate which used it to unlawfully approve the 'Pas Penggajian Pengurusan Pegawai Dagang' and 'Pas

Penggajian Pegawai Dagang'. He would be paid RM1,000 for every such approval.

[5] In a follow up action, the respondent (public prosecutor) on behalf of the Federal Government issued a seizing order pursuant to sub-ss 50(1) and 51(1) of the Act against the following properties belonging to Amar:

(a) RM192,147.79 in savings account number 106062056732 at Malayan Banking, Genting Highlands Branch, Pahang;

(b) RM259,681.45 in savings account number 4835919335 at Public Bank Bhd, Taman Maluri Cheras, Kuala Lumpur;

(c) RM102,089.20 in a fixed saving account number 1804354928 at Public Bank Bhd, Petaling Jaya, Selangor;

(d) an apartment at Batu Caves, Selangor; and

(e) a car Audi S Line TFSI CVT(A) with registration number JRC 80.

[6] Subsequently, and having satisfied himself that the properties were proceeds of an unlawful activity, the respondent applied to the High Court for forfeiture of the properties under s 56(1)(c) of the Act, which provides as follows:

> 56(1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is —
>
> (c) the proceeds of an unlawful activity;

[7] On its part the appellant, in purported exercise of its rights as a bona fide third party under s 61(4) of the Act, claimed a sum of RM398,722 from the seized properties which the respondent intended to forfeit. The basis for the claim was that it had a legitimate legal interest in the RM398,722, being legal fees for the legal services that it rendered to Amar from the day he was detained by the police up to the time of the forfeiture proceedings under s 56(1). Section 61 of the Act is reproduced below:

> Section 61 Bona fide third parties
>
> (1) The provisions of this Part shall apply without prejudice to the rights of bona fide third parties.
>
> (2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims

to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that —

(a) the claimant has a legitimate legal interest in the property;

(b) no participation, collusion or involvement with respect to the offence under subsection 4(1) which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did not acquire any right in the property from a person proceeded against under the circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

[8] The appellant's claim was allowed by the Temerloh High Court but reversed by the Court of Appeal in a unanimous decision, hence the present appeal before us.

[9] In his grounds of judgment, the learned judge of the Temerloh High Court gave the following reasons for releasing the RM398,722 to the appellant under sub-s 61(4) of the Act:

> [34] Berkaitan dengan tuntutan Pencelah untuk baki yuran guaman mahkamah berpuas hati berdasarkan keterangan lisan dan keterangan dokumentar yang dikemukakan di Jld 1 dan Jld 2, pencelah telah berjaya membuktikan mereka adalah firma guaman yang mewakili responden. Tuntutan mereka disokong oleh jumlah bil yuran guaman yang dikemukakan tanpa bantahan oleh pemohon.
>
> [35] Perlantikan Tetuan Wan Shahrizal, Hari & Co untuk mewakili responden adalah hak-hak yang termaktub di bawah perkara 5(3) Perlembagaan Persekutuan, justeru firma guaman itu berhak untuk menuntut dan menerima fi guaman daripada responden.
>
> [36] Untuk tuntutan ini peguam pencelah telah merujuk dan melampirkan kes yang diputuskan oleh Mahkamah Rayuan di mana mahkamah telah membenarkan tuntutan beberapa firma peguam di antaranya Tetuan Isharidah Chong & Menon, Tetuan Stanley Agustine & Co dan Tetuan Haresh Mahadevan & Co yang menuntut bayaran guaman dari harta yang disita iaitu kes *Md Sukri bin Shahudin*

dan 10 yang lain PR, Rayuan Jenayah: W-09-432–11 of 2016. Kes rayuan ini bermula dari mahkamah sesyen dan peguam kanan persekutuan yang mengendalikan kes pemohon dengan jujur mengakui beliau sedia maklum dengan keputusan kes rayuan ini kerana beliau terlibat dengan kes tersebut di mahkamah sesyen dan Mahkamah Tinggi. Justeru walaupun tiada penghakiman bertulis, mahkamah berpendapat fakta dalam kes rayuan tersebut adalah sama dengan kes ini untuk isu tuntutan bayaran firma guaman.

[37] Kedudukan undang-undang jelas iaitu mahkamah bawahan terikat dengan keputusan mahkamah yang lebih tinggi. *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] MLRA 653, *Timbalan Menteri Dalam Negeri, Malaysia & Ors v Arasa Kumaran* [2006] 5 MLJ 576; [2006] 2 MLRH 283.

[10] It is clear from the reasons given that the decision by the learned judge to allow the appellant's claim was premised on the following four grounds:

(a) the appellant had a right under art 5(3) of the Federal Constitution to represent Amar and therefore entitled to its legal fees;

(b) the appellant had proved that it was the law firm representing Amar;

(c) the appellant's claim for the RM398,722 in legal fees was supported by oral and documentary evidence, ie the bills that the appellant firm issued to Amar; and

(d) the learned judge was bound by the decision of the Court of Appeal in *Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya* Criminal Appeal No W-09–432–11 of 2016 (unreported) where, in His Lordship's view, the facts are similar ('... mahkamah berpendapat fakta dalam kes rayuan tersebut adalah sama dengan kes ini ...').

[11] With due respect to the learned judge, none of the grounds constitute valid reasons for allowing the claim. The Court of Appeal was absolutely correct in reversing the decision. First of all, the learned judge was wrong in holding in para 37 that he was bound by stare decisis to follow the decision of the Court of Appeal in *Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya* Criminal Appeal No W-09–432–11 of 2016 (unreported) ('Md Sukri'), which allowed the claims by several law firms, among them the law firms of Messrs Isharidah Chong & Menon, Messrs Stanley Agustine & Co and Messrs Haresh Mahadevan & Co for their legal fees to be paid from the seized properties. As confirmed by the learned judge himself, no written grounds were delivered by the Court of Appeal in that case.

[12] Without the benefit of the written grounds, there was no way that the learned judge could have known of the actual reason or reasons why the Court of Appeal decided the way it did in that case. In any case, it was wrong for him to have engaged in guesswork on the basis for the unwritten decision, which

A undoubtedly had weighed heavily in his mind in deciding whether or not to allow the appellant's claim.

[13] What binds the lower courts under the stare decisis doctrine is the ratio decidendi of the case and not mere similarity in the facts or in the law, or in the B arguments of counsel, nor the obiter dicta of the case.

[14] A lower court relying on an earlier unwritten decision of an appellate court must not assume that by affirming the decision of the lower court, the appellate court must have affirmed every finding of fact and law that the lower C court had decided in favour of the winning party. Experience will tell that it is not uncommon for an appellate court to affirm or reverse the decisions of the lower courts on grounds other than those relied on by the lower courts.

D **[15]** Nor must the court, in the absence of the written grounds, accept the argument that the appellate court in the earlier case decided the way it did because it accepted counsel's argument, even where the earlier case involved the same counsel. Such acceptance of counsel's argument must be reflected in the written grounds of judgment. The role of counsel is to assist and the court to E decide.

[16] *Ratio decidendi* is Latin for 'the rationale for the decision'. The term refers to a key judicial point or chain of reasoning in a case that drives the final judgment. It is 'the principle or rule of law on which a court's decision is F founded' (*Black's Law Dictionary* (11th Ed)) or 'the principle that the case establishes' (*Barron's Law Dictionary* (2nd Ed)).

[17] Obviously therefore, a decision that is delivered without the written grounds does not establish any principle or rule of law on which the decision is G founded. The decision is therefore devoid of any *ratio decidendi* (rationale for the decision). It has no value as precedent. There may be instances where the court, either in its original or appellate jurisdiction, delivers a reasoned oral decision *ex tempore* but in that situation, the reasons must be reduced into H writing in order for the decision to have any binding effect on the lower courts.

[18] We are not aware of any principle of law, nor have we been referred to any authority to say that the lower courts are bound by stare decisis even where the higher courts do not provide written grounds for their decisions. The I following explanatory note on the doctrine, which can be found in *Black's Law Dictionary*, is relevant:

> The doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination, or

to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases.

[19] Thus, where there are no grounds written, there is no point or principle of law that can officially be decided or settled by the ruling of a competent court. The correct position of the law is that an unwritten decision of a higher court, whether sitting in its original or appellate jurisdiction, binds the parties to the action but is not authority for any principle or rule of law and does not bind the lower courts. This is where the learned judge in the present case fell into error when he said that he was bound by stare decisis to follow the unwritten decision of the Court of Appeal in *Md Sukri.*

[20] Presumably, the learned judge was not alerted to the decision of this court in *Vishnu a/l Telagan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 1; [2019] 9 CLJ 177 where David Wong Dak Wah CJ (Sabah and Sarawak) delivering the unanimous decision of the court said:

> [40] The respondents argued that the Federal Court there had heard a similar argument on this point and refused the detainee a writ of *habeas corpus*. As at the date of our decision in this appeal, no written grounds had been delivered in respect of that case and so we are therefore unable to glean any reasons why such a decision was made. Therefore we did not see how the said judgment lent any support to the respondent's case. Surely, in arriving at our decision, we had to consider and apply the law according to the facts and circumstances of this case.

[21] The decision of this court referred to in the above passage is the unreported case of *Kamal Azam Borddin v Timbalan Menteri Dalam Negeri & Ors* Criminal Appeal No 05(HC)-133–05 of 2018(B) (unreported). In that case, a five member bench headed by Richard Malanjum CJ unanimously dismissed the appellant's appeal against the decision of the High Court dismissing his application for habeas corpus without giving any reason, written or otherwise, after hearing arguments by the parties.

[22] In fact a similar decision was reached in an earlier decision of this court in *Malaysian Motor Insurance Pool v Tirumeniyar a/l Singara Veloo* [2020] 1 MLJ 440; [2019] 10 CLJ 731. This is what the court said at para 82:

> [82] Without a written judgment the Federal Court's reasons for allowing the appeal as alluded to in the editorial note, is in our view purely speculative, and cannot be regarded as authoritative and/or binding. We would therefore disagree with the plaintiff that the Court of Appeal erred and 'was in breach of stare decisis' when it did not consider itself bound to follow *Saw*.

[23] Applying the above ratio to the present case, the learned judge would not have been in breach of stare decisis if he had chosen not to follow the decision of the Court of Appeal in *Md Sukri*. What was required of him was to

consider and apply the law according to the facts and circumstances of the case before him (*Vishnu a/l Telagan*) instead of tying his own hands to the unwritten decision of the Court of Appeal.

[24] Having formed his opinion that the facts of the present case were similar ('sama') to the facts in *Md Sukri,* the learned judge went on to rule that the bills produced by the appellant were sufficient proof that it is a bona fide third party and therefore entitled to the RM398,722 seized from Amar, without directing his mind to the question whether the appellant had a legitimate legal interest (not just any interest) in the RM398,722, which is the proceeds of an unlawful activity.

[25] This is a serious misdirection by way of non-direction which renders the judgment defective and liable to be set aside. The bills that the appellant produced in support of its claim are not proof that it is a *bona fide* third party and has a legitimate legal interest in the RM398,722. The fact that there was no objection to the production of the bills as evidence is of no consequence because all that the bills established was that Amar had been charged RM398,722 in legal fees by the appellant for the legal services that it rendered to him.

[26] Unquestionably the RM398,722 is money owing to the appellant by Amar, which he is at liberty to pay using any property at his disposal but not from the seized property, which we reiterate is illegal property. Illegal property does not become legal property by using it to pay legal fees.

[27] If this court were to endorse the learned judge's reasoning and accede to the appellant's argument, we would be setting a dangerous precedent whereby a law firm which represents a client in forfeiture proceedings under the Act would as a matter of right be entitled to be paid its legal fees using illegal property, ie proceeds of an unlawful activity, which is not even the client's rightful property which he can use any which way he likes after its seizure under sub-ss 50(1) and 51(1) of the Act.

[28] And if that were to be allowed, all that a law firm needs to do to succeed in its claim under s 61(4) is simply to produce the bills for the legal services that it rendered to its client, as done by the appellant in the present case. That will be as good as returning the seized property to the person proceeded against under s 56(1) and allowing him to use the property in a way that allows him to enjoy the benefits of his crime. Clearly, it will be against the spirit of the Act to allow such property to be used in such manner. This is the kind of mischief that para (d) of s 61(4) aims to strike down.

[29] The object of s 56 is explained in the following terms in para 60 of the

Explanatory Statement to the Act:

> 60. Clause 56 seeks to empower the Public Prosecutor, where there is no prosecution or conviction for an offence, to apply to a court for the forfeiture of any property that he is satisfied has been obtained as a result of, or in connection with such offence. If there is no conviction or forfeiture, the property seized shall be released to the person from whom it was seized. This is to ensure that even if there is no conviction but the court is certain that property has been obtained as a result of the offence the money launderers do not enjoy the benefits of their crimes.

[30] It is important to bear in mind that in proceedings under s 61(4), the burden is on the person claiming to be a bona fide third party and having a legitimate legal interest in the property to show cause as to why the property should not be forfeited. It is not for the respondent to prove in the negative that the claimant is not a bona fide third party and has no legitimate legal interest in the property. In order to succeed, the third party claimant must prove on the balance of probabilities (see s 70(1) of the Act) that the requirements of paras (a), (b), (c), (d) and (e) of the subsection, which are to be enforced cumulatively (and not disjunctively), have all been fulfilled.

[31] As to what constitutes sufficient proof on the balance of probabilities, Lord Denning said in *Miller v Minister of Pensions* [1947] 2 All ER 372:

> If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal, it is not.

[32] Whether or not the requirements have been fulfilled is purely a question of fact, and such requirement for proof must be fulfilled by all third parties claiming entitlement to the property, law firms included. In the present case, the burden has not been discharged by the appellant as no such evidence was produced before the court. In any case, we have not been shown the evidence save for the bills charged to Amar as legal fees, which we repeat merely shows that Amar owes that sum of money to the appellant.

[33] The appellant in its petition of appeal proffered five grounds for impugning the decision of the Court of Appeal, as follows:

(a) the Court of Appeal judges erred in law and fact when making an interpretation of the Act based on the intention of Parliament without taking into consideration that s 61 of the Act is an exception to s 56(1) of the same Act;

(b) the Court of Appeal judges erred in law and fact when they failed to take into consideration that the burden provided under s 61(4) of the Act is on the balance of probabilities and that the appellant had successfully proven that they are bona fide third party under the Act;

A (c) the Court of Appeal judges erred in law and fact when they made a finding that 'there is no express provisions under the Act that allow the proceeds of the unlawful activity to be used for payment of legal fees' without taking into consideration of s 44 of the Act that allows payment of legal fees;

B (d) the Court of Appeal judges erred in law and fact when they failed to make a finding that it is against the right to counsel under art 5(3) of the Federal Constitution to deny the appellant's claim for legal fees over the seized properties; and

C (e) the Court of Appeal judges erred in law and fact when they failed to take into consideration that the appellant's client has been detained under the Prevention of Crime Act 1959 and was released by way of a habeas corpus application. This shows that there was criminal proceedings against their client and thus, an action under s 56(1) has been wrongly instituted.

D **[34]** At the hearing before us, learned lead counsel for the appellant, Datuk Seri Gopal Sri Ram, amplified the grounds of appeal by advancing the following arguments in his 'Speaking Note':

E (a) the Court of Appeal was wrong in construing s 61 of the Act against the appellant who had appeared for and represented Amar in these proceedings;

(b) the right to be represented by a counsel of choice is a guaranteed fundamental right under art 5(3) of the Federal Constitution and that the F way the Court of Appeal construed s 61 of Act renders that right illusory;

(c) the right to personal liberty will be rendered illusory if lawyers are expected to appear free of charge and that there is an implied duty to pay legal fees and no lawyer is going to appear for free. The Court of Appeal G judgment does not meet the realities;

(d) a consequence of the decision of the Court of Appeal is that lawyers will refuse to act in such cases because there is no hope of payment. The right of representation has the corresponding right to livelihood on the part of H lawyers;

(e) s 61 of the Act should be interpreted to ensure its constitutionality;

(f) an interpretation of a statute that renders a fundamental right illusory has the effect of making that statute unconstitutional (*Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ I 697; [1992] 1 CLJ Rep 72 at p 712);

(g) if two interpretations of a statute are possible, one that will render it unconstitutional, and another that will render it constitutional, the latter will be preferred by the court (*Kedar Nath Singh v State of Bihar* 1962

AIR 955, decided on 20 January 1962); *ML Kamra v The Chairman-cum-Managing Director, New India Assurance Co Ltd and another* (1992) 2 SCC 36 at p 41);

(h) there is a presumption that Parliament will not enact a statute that violates the rule of law (*Pierson v Secretary of State for the Home Department* [1997] 3 All ER 577 at p 607);

(i) there is a presumption that Parliament does not legislate in violation of fundamental rights (*Regina v Secretary of State for the Home Department, ex parte Simms and another* [2000] 2 AC 115 at p 130);

(j) there is a presumption that Parliament will not enact an unjust law (*Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 at p 31);

(k) the provisions of a statute should be read harmoniously with fundamental rights (*Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751 at p 763; [2015] 8 CLJ 921; [2015] 6 AMR 338);

(l) by interpreting s 61 harmoniously with the Federal Constitution and bearing in mind the rule of law embedded in art 5(1), s 61 should be read to enable lawyers who had entered legal services to be paid fairly and reasonably;

(m) the Court of Appeal overlooked this important point of law and fell into error. Though the label the Court of Appeal used was *purposive*, it actually employed the *literal* approach. It failed to give a constitutional compliant interpretation, as can be seen from the following paragraphs of the judgment:

> [25] In relation to this provision, it was the intention of the Parliament that money launderer which includes any person that acquires proceeds of an unlawful activity, should not enjoy the benefit of their crime even though there is no prosecution made or conviction obtained for an offence.
>
> [27] The scheme of the Act and its purposes as can be gleaned from the provisions mentioned above, the Explanatory statements and the explanation by the Deputy Finance Minister when tabling the Bill, is clear, among others, that no person should receive any benefit from the proceeds of an unlawful activity and in particular the person who directly involves in the said unlawful activity.
>
> [33] As alluded to earlier, the scheme and purpose of the Act is to prevent money laundering and forfeiture of proceeds from an unlawful activity as specified under the Act. This also includes preventing any person or body from obtaining any benefit from the proceeds of the unlawful activity. In the circumstances, the purposive approach must be taken in interpreting the provision of s 61(4) of the Act. This too, is in consonant with s 17A of the Interpretation Acts 1948 which provides as follows ...

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[35] Coming back to the present case, the words 'legitimate legal interest' in sub-s 61(4)(a) is not defined under the Act. This imports contradictory interpretation by parties involved as happened in this case. Hence, it is appropriate for the application of the purposive approach and to have regard to the intention of the legislature, inter alia, that no one should enjoy the proceeds of an unlawful property. This includes, the payment of the respondent's legal fees to the Intervener. Moreover, there is no express provision under the Act that allow the proceeds of the unlawful activity to be used for payment of legal fees.

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[37] Clearly, the law in Singapore and Malaysia has no such provision as the South African POCA which allows for the payment of the legal expenses from the seized property. Therefore, the High Court judge in the instant case erred in allowing the Intervener's application for the legal fees to be paid from the respondent's seized properties as there was no express provision allowing the said application and it was against the intention of the legislature in enacting the Act.

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(n) the Court of Appeal judgment departs from realities and is reflected in the following paras 46–47 of the judgment:

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[46] Our point here is that the respondent's legal fees can still be paid by him from his properties which were not proceeds of an unlawful activity. Here, the issue of rights to counsel raised by the counsel for the intervener is untenable.

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[47] On the same issue, the contention by counsel for the intervener that art 5(3) of the Federal Constitution indirectly imposes responsibility on the respondent to pay his legal fees is misconceived. Nothing in art 5(3) or other related Articles that can be discerned to impose the responsibility to pay the legal fees.

(o) the alternative remedy suggested by the Court of Appeal in the following paras 40–41 of its judgment also has the effect of rendering the right of representation illusory:

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[40] Reverting to the instant case, firstly, there was a contractual relationship between the Intervener and the respondent ...

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[41] In the circumstances, the intervener has the recourse to take legal action against the respondent for the unpaid legal fees under the said contract. This action is an action *in personam* and no proprietary interest can be attached to the respondent's seized properties which is the proceeds of an unlawful activity. This is applicable only if judgment has been obtained against the respondent for the payment of the legal fees, which is none in the present case.

I

(p) the existence of an alternative remedy is not contemplated by statute. Second, if every time a lawyer has to sue the client for his fees and to incur unnecessary expenses therein, the result may be that he would only obtain a paper judgment. The right to legal counsel is to be paid in

advance, and not as a debt collected from the client. As such, the suggestion by the Court of Appeal would burden the judicial system with unnecessary litigation; and

(q) as an officer of the court, a lawyer is a bona fide third party.

[35] The proposition in the last ground above is fascinating and has far reaching consequences. For all intents and purposes, it suggests that being a bona fide third party by default (as an officer of the court), a lawyer is entitled to be paid his legal fees using property seized under sub-ss 50(1) and 51(1) without having to show cause under s 61(4) as to why the property should not be forfeited but to be released to him as a matter of right. All that he needs to do is to show that he is the lawyer representing the person whose property has been seized under the Act. Once that is shown, the bona fide of his claim would have been established.

[36] Effectively this will, as against lawyers, render sub-s 56(2)(a) of the Act completely redundant and bereft of all meaning, a major impediment to the Government's effort to combat money laundering, as illegal money seized under the Act could then be cleansed by using it to pay for lawyers fees. The provision reads as follows:

(2) The judge before whom an application is made under subsection (1) shall make an order for forfeiture of the property if he is satisfied —

(a) that the property is —

(i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

(ii) terrorist property;

(iii) the proceeds of an unlawful activity; or

(iv) the instrumentalities of an offence;'

[37] There can be no argument that the properties seized from Amar, including the RM398,722 claimed by the appellant as its legal fees, are the proceeds of an unlawful activity. In any event, it is not the appellant's case that the RM398,722 is not the proceeds of an unlawful activity. It's case simply is that it has a legitimate legal interest in the money and therefore entitled to it.

[38] Amar it will be noted was not prosecuted for an offence under s 4(1) or a terrorism financing offence. What the respondent did was to proceed under s 56(1)(c) against his properties. For austerity, s 4(1) of the Act is reproduced below:

4(1) Any person who —

A

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or use proceeds of an unlawful activity or instrumentalities of an offence;

B

(c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or

(d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence,

C

commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of the offence at the time the offence was committed or five million ringgit, whichever is higher.

D

[39] Of the several grounds raised by the appellant in attacking the decision of the Court of Appeal, it is clear that the main thrust of its argument is that the Court of Appeal erred in not applying the purposive approach in interpreting s 61 of the Act. Instead it applied the literal approach.

E

[40] The contention by Datuk Seri Gopal Sri Ram was that the Court of Appeal failed to interpret s 61 harmoniously with art 5(1) of the Federal Constitution ('No person shall be deprived of his life or personal liberty save in accordance with law') to enable lawyers who have rendered legal services to be paid fairly and reasonably.

F

G

[41] With the greatest of respect to the learned counsel, nothing can be further from the truth. On a careful reading of the judgment, one can only conclude that the Court of Appeal applied the purposive approach in interpreting s 61 and not the literal approach as alleged by counsel. It is clear from para 33 of the judgment that the Court of Appeal was alive to the need to interpret s 61(4) purposively, where Nordin Hassan JCA (now FCJ) speaking for the court said:

H

[33] As alluded to earlier, the scheme and purpose of the Act is to prevent money laundering and forfeiture of proceeds from an unlawful activity as specified under the Act. This also includes preventing any person or body from obtaining any benefit from the proceeds of the unlawful activity. In the circumstances, the purposive approach must be taken in interpreting s 61(4) of the Act. This too, is in consonant with s 17A of the Interpretation Acts 1948 which provides as follows:

I

Section 17A

> 17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[42] It is therefore incorrect in the circumstances for learned counsel to make the striking allegation that 'Though the label the Court of Appeal used was *purposive*, it actually employed the *literal* approach'. It is a discreet way of saying that the three Court of Appeal judges did not know the difference between the purposive and literal approach. With all due respect, the allegation is not only baseless but goes against the grain and basic structure of the judgment.

[43] The rationale for counsel's contention was that the right to be represented by counsel of one's choice is a guaranteed fundamental right under art 5(3) of the Federal Constitution and that the way the Court of Appeal construed s 61 of the Act renders that right illusory.

[44] According to counsel, there is an implied duty to pay legal fees. He went so far as to say that a consequence of the Court of Appeal's decision is that lawyers will refuse to act in such cases because there is no hope of payment. He pointed out that legal fees are to be paid in advance and is not a debt to be collected by a lawyer from his client. He lamented that if the lawyer has to sue for the debt, it would burden the judicial system with unnecessary litigation.

[45] Learned counsel went on to argue that the Court of Appeal judgment does not meet the realities as 'no lawyer is going to appear for free'. We are not sure how far that is true but what we can say without fear of contradiction is that there are conscientious lawyers out there who act *pro bono* for their clients. It surprises us that learned counsel appears to be completely unaware of this fact.

[46] Anyway, the guaranteed fundamental right to be represented by counsel of one's choice under art 5(3) of the Federal Constitution has no bearing on the issue before the court, which is whether the counsel of one's choice is entitled to be paid his legal fees using money that is the proceeds of an unlawful activity.

[47] For this reason, counsel's contention that the Court of Appeal's interpretation of s 61(4) has rendered the right to counsel illusory is a total misconception and failure to comprehend the purpose behind the forfeiture provisions. Counsel's argument if accepted will defeat the legislative object of the Act rather than to put its object into effect.

[48] It was also the appellant's contention that the Court of Appeal erred in law and fact in finding that 'there is no express provisions under the Act that

allow the proceeds of the unlawful activity to be used for payment of legal fees' without taking into consideration s 44 of the Act which allows for payment of legal fees, an obvious reference to sub-s 44(3)(c) of the Act. For context, we reproduce s 44 in its entirety:

> 44 Freezing of property
>
> (1) Subject to section 50, an enforcement agency may issue an order to freeze any property of any person, or any terrorist property, as the case may be, wherever the property may be, and whether the property is in his possession, under his control or due from any source to him, if —
>
> (a) an investigation with regard to an unlawful activity has commenced against that person; and
>
> (b) either —
>
> (i) the enforcement agency has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence has been or is being or is about to be committed by that person; or
>
> (ii) the enforcement agency had reasonable grounds to suspect that the property is the proceeds of an unlawful activity or the instrumentalities of an offence.
>
> (2) An order under subsection (1) may include —
>
> (a) an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances, if any, as are specified in the order;
>
> (b) an order to authorize any of its officers to take custody and control of the property, or such part of the property as is specified in the order if the enforcement agency is satisfied that the circumstances so require;
>
> (c) where custody and control of the property is taken under paragraph (b), an order to authorize any of its officers to sell any frozen moveable property by a public auction or in such other manner as may be practicable if the enforcement agency is of the opinion that the property is liable to speedy decay or deterioration;
>
> (d) an order to authorize any of its officers to hold the proceeds of the sale, after deducting therefrom the costs and expenses of the maintenance and sale of the property sold under paragraph (c); and
>
> (e) an order as to the manner in which the property should be administered or dealt with.
>
> (3) In making an order under subsection (1), the enforcement agency may give directions to the person named or described in the order relating to the disposal of the property for the purpose of —
>
> (a) determining any dispute as to the ownership of or other interest in the property or any part of it;

(b) its proper administration during the period of the order; A

(c) the payment of the costs of that person to defend criminal proceedings against him.

(4) An order made under subsection (1) may direct that the person named or described in the order shall — B

(a) be restrained, whether by himself or by his nominees, relatives, employers or agents, from selling, disposing of, charging, pledging, transferring or otherwise dealing with or dissipating his property;

(b) not remove from or send out of Malaysia any of his money or property; and C

(c) not leave or be permitted to leave Malaysia and shall surrender any travel documents to the Director-General of Immigration within one week of the service of the order.

(5) An order made under subsection (1) shall cease to have effect after ninety days after the order, if the person against whom the order was made has not been charged with an offence under this Act or a terrorism financing offence, as the case may be. D

(6) An enforcement agency shall not be liable for any damages or cost arising directly or indirectly from the making of an order under this section unless it can be proved that the order under subsection (1) was not made in good faith. E

(7) Where an enforcement agency directs that frozen property be dealt with, the person charged with the administration of the property shall not be liable for any loss or damage to the property or for the cost of proceedings taken to establish a claim to the property or to an interest in the property unless the court before which the claim is made finds that the person charged with the administration of the property has been negligent in respect of the administration of the property. F

(8) The enforcement agency effecting any order to freeze any property under this section shall send a copy of the order and a list of the frozen property to the Public Prosecutor forthwith.

G

(9) Where the frozen property is in the possession, custody or control of a financial institution, the enforcement agency shall notify the relevant regulatory or supervisory authority (if any), as the case may be, of such order.

(10) Any person who fails to comply with an order of the enforcement agency issued under subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding five times the sum or value of the frozen property at the time the property was frozen or five million ringgit, whichever is higher, or to imprisonment for a term not exceeding seven years or to both. H

[49] We are in agreement with the learned deputy public prosecutor on this point, that s 44 of the Act has no application as the provision deals with the freezing of property and not with forfeiture. The procedure laid down by s 44 is to preserve the status quo of the seized property during the course of police investigation. It has no application to proceedings for forfeiture under s 56(1), I

nor to proceedings for the return of seized property by third parties under s 61(4).

[50] It is pertinent to note that both under s 56(1) and under s 61(4), no criminal proceedings are instituted against any person for any serious offence or foreign serious offence. 'Criminal proceedings' is defined by s 3(1) as follows (unless the context otherwise requires):

> a trial of a person for a serious offence or foreign serious offence, as the case may be, and includes any proceedings to determine whether a particular person should be tried for the offence.

[51] The *Hansard* dated 9 May 2021 recorded the Deputy Minister of Finance as having made the following statement when tabling the bill on the proposed s 44:

> Fasal 44, menjelaskan kuasa-kuasa sesuatu agensi penguat kuasa untuk mengeluarkan sesuatu perintah pembekuan ke atas harta seseorang yang disyaki melakukan suatu kesalahan pengubahan wang haram. Namun begitu, perintah itu akan terhenti berkuat kuasa jika ia tidak dipertuduhkan dengan mana-mana kesalahan di bawah Akta ini.

[52] Therefore, where a person is not on trial for a serious offence or foreign serious offence, the question of payment of costs by the person whose property is frozen to defend criminal proceedings against him as contemplated by sub-s 44(3)(c) does not arise in proceedings under sub-s 61(4). The question would only arise if criminal proceedings has been instituted against him under the Act.

[53] In the present case no criminal proceedings has been instituted against Amar under the Act and he is not on trial for any serious offence or foreign serious offence. The proceedings against him was only for forfeiture of his properties under s 56(1) and not for committing any criminal offence although he was investigated for offences under ss 124 and 130V of the Penal Code and s 5 of the Computer Crimes Act 1997.

[54] On a related issue, the Court of Appeal referred, appropriately in our view, to the following passages in the judgment of the Singapore Court of Appeal in *Centillion Environment & Recycling Ltd (formerly known as Citiraya Industries Ltd) v Public Prosecutor and others and another appeal* [2013] 1 SLR 444; [2012] SGCA 65 where the Apex Court pointed out the difference between the Singapore Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed) ('the CDSA') and the South African Prevention of Crimes Act 1998:

> The ABSA Bank cases involved an application by a bank which was a judgment

creditor of one Trent Gore Fraser ('Fraser'). Fraser was indicted of charges relating to racketeering and drug trafficking, and a restrain order was granted in relation to Fraser's property under the South African POCA. Fraser then took out an application under s 26(6) of the South African POCA seeking an order for the curator bonis of the restrained property to sell a portion of his property to pay legal expenses in his criminal trial. The bank applied to intervene and oppose Fraser's application on the basis of judgment it had obtained against Fraser. The Supreme Court of South Africa held (at [21]) of ABSA Bank (Supreme Court) that s 31 of the South African POCA authorised the High Court to direct 'such payment' out of the realised proceeds of the defendant's property before the proceeds are applied in satisfaction of the confiscation order. The intention of this provision was to provide creditors with the means of bringing their claims to the court's attention to be taken into account before satisfaction of the confiscation order, and the High Court must accordingly retain the power to entertain applications by such creditors with claims in the restrained property (at [22]) of ABSA Bank (Supreme Court). This power was equally exercisable when the court exercise its wide discretion under s 26(6) to release restrained property to meet legal expenses incurred by the defendant (at [28]) of ABSA Bank (Supreme Court). The decision of the Supreme Court was thus premised on the South African POCA, which differs materially from CDSA.

[55] There the court was dealing with sub-ss 13(1) and (2) of the CDSA, which we are mindful are not exactly similar to sub-s 61(4) of the Act, and which provide as follows:

13 Protection of rights of third party

(1) Where an application is made for a confiscation order under section 4 or 5, a person who asserts an interest in the property may apply to the court, before the confiscation order is made, for an order under subsection (2).

(2) If a person applies to the court for an order under this subsection in respect of his interest in property and the court is satisfied —

(a) that he was not in any way involved in the defendant's drug

(b) trafficking or criminal conduct, as the case may be; and

(c) that he acquired the interest —

(i) for sufficient consideration; and

(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it, property that was involved in or derived from drug trafficking or criminal conduct, as the case may be,

the court shall make an order declaring the nature, extent and value (as at the time the order is made) of his interest.

[56] Of relevance to note is that the subsection uses the word 'interest' which sub-s 2(1) of the CDSA defines as 'in relation to property, includes any right',

whereas sub-s 61(4)(a) of the Act uses the words 'legitimate legal interest'. The requirements of sub-s 61(4) of the Act appear to be more stringent than the requirements of sub-s 13(2) of the CDSA.

[57] The further argument advanced by the appellant which merits consideration is the contention that the Court of Appeal failed to take into account the fact that Amar was detained under the Prevention of Crime Act 1959 and was released by way of a habeas corpus application, which according to counsel shows that criminal proceedings had been instituted against Amar and thus, an action for forfeiture against him under s 56(1) was unlawful.

[58] We find nothing of substance to the argument as s 56(1) speaks of 'prosecution' or 'conviction' and not 'criminal proceedings'. We have in para 50 above referred to the meaning of 'criminal proceedings' given by s 3(1) of the Act.

[59] Before we conclude, we think it is appropriate for us to refer to the United States Supreme Court case of *Caplin & Drysdale v United States* (1989) 491 US 617 decided on 22 June 1989. Admittedly the facts are not on all fours with the facts of the present case, nor are the statutory provisions under consideration identical, but the case is instructive of the question whether a law firm can be paid its legal fees from the proceeds of an unlawful activity.

[60] For the facts of the case, it will suffice if we refer to the headnote which for convenience we shall break down into paragraphs and with the necessary modifications. In that case, one Christopher Reckmeyer ('Reckmeyer') was charged with running a massive drug importation and distribution scheme alleged to be a continuing criminal enterprise (CCE) in violation of 21 USC 848. Relying on a portion of the CCE statute that authorizes forfeiture to the Government of property acquired as a result of drug-law violations, 853, the indictment sought for forfeiture of specified assets in Reckmeyer's possession.

[61] The District Court, acting pursuant to 853(e)(1)(A), entered a restraining order forbidding Reckmeyer from transferring any of the potentially forfeitable assets. Nonetheless, he transferred $25,000 to the petitioner, a law firm, for pre-indictment legal services.

[62] The law firm continued to represent Reckmeyer after his indictment. Reckmeyer moved to modify the District Court's order to permit him to use some of the restrained assets to pay the law firm's fees and to exempt such assets from post-conviction forfeiture. However, before the court ruled on his motion, Reckmeyer entered a plea agreement with the Government in which, inter alia, he agreed to forfeit all of the specified assets.

[63] The court then denied Reckmeyer's motion and subsequently made an order forfeiting virtually all of his assets to the Government. The law firm, arguing that assets used to pay an attorney are exempt from forfeiture under 853 and, if they are not, that the statute's failure to provide such an exemption renders it unconstitutional, filed a petition under 853(n) seeking an adjudication of its third-party interest in the forfeited assets.

[64] The District Court granted the relief sought. However, the Court of Appeal reversed the decision, finding that the statute acknowledged no exception to its forfeiture requirement and that the statutory scheme is constitutional.

[65] In affirming the decision of the Court of Appeal, it was, inter alia, held by the United States Apex Court as follows:

> The forfeiture statute does not impermissibly burden a defendant's Sixth Amendment right to retain counsel of his choice. A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney even if those funds are the only way that a defendant will be able to retain the attorney of his choice. Such money, though in his possession, is not rightfully his. Petitioner's contention that, since the Government's claim to forfeitable assets rests on a penal statute that is merely a mechanism for preventing fraudulent conveyances of the assets and is not a device for determining true title to property, the burden the statute places on a defendant's rights greatly outweighs the Government's interest in forfeiture is unsound. Section 853(c) reflects the application of the long-recognised and lawful practice of vesting title to any forfeitable assets in the hands of the Government at the time of the criminal act giving rise to forfeiture. Moreover, there is a strong governmental interest in obtaining full recovery of the assets, since the assets are deposited in a fund that supports law-enforcement efforts, since the statute allows property to be recovered by its rightful owners, and since a major purpose behind forfeiture provisions such as the CCE's is to lessen the economic power of organized crime and drug enterprises, including the use of such power to retain private counsel. The forfeiture statute does not upset the balance of power between the Government and the accused in a manner contrary to the Due Process Clause of the Fifth Amendment. The Constitution does not forbid the imposition of an otherwise permissible criminal sanction, such as forfeiture, merely because in some cases prosecutors may abuse the processes available to them. Such due process claims are cognizable only in specific cases of prosecutorial misconduct, which has not been alleged here.

[66] The significance of the case is that the court did not permit the defendant (Reckmeyer) to use some of the restrained assets to pay the law firm's legal fees and that the forfeiture statute does not upset the balance of power between the Government and the accused in a manner contrary to the Due Process Clause of the Fifth Amendment, which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless

A on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall
B private property be taken for public use, without just compensation.

[67] The case is also relevant for the court's observation that a major purpose behind the forfeiture provisions in the CCE statute is to lessen the economic power of organized crime and drug enterprises, including the use of such power
C to retain private counsel. The observation applies with equal force to the forfeiture provisions in the Act.

[68] It was for all the reasons aforesaid that we dismissed the appeal and affirmed the decision of the Court of Appeal. My learned sister Justice Hasnah
D Mohammed Hashim has read this judgment in draft and has agreed to it.

Mary Lim FCJ (delivering dissenting judgment of the court):

E **[69]** The appellant was the second third party who successfully secured the release of monies seized from Amar Asyraf bin Zolkepli, its erstwhile client, pursuant to s 56(1) read with s 61 of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613). That success was short-lived as the Court of Appeal allowed the public
F prosecutor's appeal. On appeal, that decision was sustained by majority. These are the reasons for my dissent.

ESSENTIAL FACTUAL BACKGROUND

G **[70]** These facts are culled from the appeal records.

[71] On 9 June 2016, the police initiated investigations against Amar Asyraf bin Zolkepli ('Amar') for offences under s 5 of the Computer Crimes Act 1997 (Act 563) and ss 124 and 130V of the Penal Code. The investigations revealed
H that Amar was able to obtain unauthorised access to the MYIMMs system of the Immigration Department through a software that he had. Amar provided this software to a syndicate who in turn used it to access the MYIMMs system and obtain unlawful approvals known as 'Pas Penggajian Pengurusan Pegawai Dagang' and 'Pas Penggajian Pegawai Dagang'. Amar received RM1,000 for
I each approval secured using that software.

[72] Amar was arrested on 29 June 2016 and remanded for 28 days until 27 July 2016 for investigations under the Security Offences (Special Measures) Act 2012 (Act 747) ('the SOSMA') by the Sessions Court at Kuala Lumpur.

That remand was extended for a further period of 38 days under the Prevention of Crime Act 1959 (Act 297) ('the POCA'). A

[73] On 22 September 2016, an electronic monitoring device under s 7 of POCA was attached on Amar. On 30 September 2016, Amar was ordered to be detained for two years under s 19A(1) of POCA. B

[74] Amar then applied for a writ of habeas corpus on 6 January 2017. The application was allowed on 16 June 2017 by the High Court at Kuala Lumpur. C

[75] Throughout these criminal proceedings, be it before the sessions court or the High Court at Kuala Lumpur, and the inquiry and appeal proceedings under POCA (respectively before the investigating officer at Kementerian Dalam Negeri and the Advisory Board at Bentong Prison), Amar was represented by the appellant, upon Amar's instructions. At the sessions court, the appellant appeared to oppose the extension of the remand orders. D

[76] According to the appellant, it had invoiced Amar legal fees at each stage of the proceedings mentioned earlier. Initially, its fees were for a sum of RM25,000 and this was paid by Amar. The subsequent invoices amounted to RM398,722 and that sum remains due. E

[77] Amar was never charged in a court of law for any offence under any or all the laws earlier mentioned, including Act 613. Meanwhile, through five separate orders issued under Act 613, various movable and immovable properties of Amar ('properties') were seized: F

(a) order dated 15 July 2016 issued by the Investigating Officer under s 45(1) in respect of a car, Audi S Line;

(b) order dated 19 September 2016 issued by the public prosecutor under s 50(1) in respect of RM192,147.79 in a savings account at Malayan Banking Bhd; G

(c) order dated 19 September 2016 issued by the public prosecutor under s 50(1) in respect of RM259,681.45 in a savings account at Public Bank Bhd, Cheras; H

(d) order dated 19 September 2016 issued by the public prosecutor under s 50(1) in respect of RM102,089.20 in a fixed savings account at Public Islamic Bank Bhd, Petaling Jaya; and I

(e) order dated 13 October 2016 issued by the public prosecutor under s 51(1) in respect of an apartment at Batu Caves.

[78] On 23 June 2017, the public prosecutor ('PP') applied to forfeit the

aforementioned properties under s 56 read with s 61 of Act 613.

[79] As required under s 61, a notice in the *Gazette* calling upon any third party who claims to have an interest in the property to attend before the court to show cause as to why the properties shall not be forfeited was issued. Public Islamic Bank Bhd and the appellant attended as interested third parties. Public Islamic Bank Bhd asserted rights over the RM102,089.20 in the fixed savings account and the apartment at Batu Caves. The appellant, on the other hand, asserted rights over a sum of RM398,722 as balance outstanding for legal services rendered in representing Amar in the various proceedings mentioned earlier.

DECISION OF THE HIGH COURT

[80] After hearing evidence, the High Court allowed the application of both third parties. The appeal records show an order of the High Court dated 13 November 2018 finding both third parties to be bona fides and allowing their respective claims — see p 123 of *Rekod Rayuan Jld* 1. The sum effect of these orders means that there were still some properties in the form of monies in the accounts seized. Unfortunately, there is no record of any further or consequential order forfeiting these remaining properties. It is unclear if the High Court made some other separate order to that effect. Quite aside from this, there does not appear to be any finding by the High Court that the properties were indeed proceeds of an unlawful activity.

[81] Be that as it may, the High Court was inclined to believe the appellant and the Public Islamic Bank Bhd. From the grounds of judgment, it is quite clear that the learned judge found Public Islamic Bank Bhd to have met the cumulative conditions in s 61(4)(a) to (e), and that there was good faith on the part of Public Islamic Bank Bhd. The learned judge then concluded that the properties claimed by Public Islamic Bank Bhd ought to be returned to them (*perlu dikembalikan kepada mereka sewajarnya*).

[82] As for the appellant's claim, the learned judge was satisfied that legal services had been rendered for which invoices had been properly raised and produced in evidence before the court. The appointment of the appellant was Amar's fundamental right to legal representation under art 5(3) of the Federal Constitution. This meant that the appellant was entitled to claim fees for such representation. The learned judge relied on the Court of Appeal's decision in *Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya* Criminal Appeal No W-09–432–11 of 2016 (unreported). Although there were no written grounds of decision from that case, the learned judge opined that the facts and issues were similar; relying on the learned senior federal counsel appearing before the court who candidly admitted that she was actually the officer in

charge of that case at the sessions court and High Court and was thus in the position to confirm the observations of the court.

DECISION OF THE COURT OF APPEAL

[83] The Court of Appeal disagreed with those findings of the High Court when the learned PP appealed against that decision in respect of the appellant. The learned PP did not appeal against the order made in favour of Public Islamic Bank Bhd.

[84] At para 15 of its grounds, the Court of Appeal opined that the core issue was whether the legal fees of counsel represented Amar could be paid from properties seized under ss 50(1) and 51(1) of the Act; and whether counsel, by virtue of the unpaid fees has a legitimate legal interest in Amar's properties as laid down in s 61(4) of the Act. Applying the purposive approach of interpretation, the Court of Appeal held that the appellant's legal fees cannot be paid from the seized properties and that the appellant had no legitimate legal interest in the property[s] — see para 43. According to the Court of Appeal, the objective and scheme of the Act was, inter alia, to prevent money laundering and to forfeit properties derived from or involved in proceeds of unlawful activity under the scheme and purpose of the Act. No person should receive any benefit from the proceeds of an unlawful activity or 'enjoy the benefit of their crime even though there is no prosecution made or conviction obtained for an offence'; in particular the person who was directly involved in the unlawful activity.

[85] The court however, recognised that the scheme of the Act provided for the return of seized or forfeited property to bona fide third parties who successfully establish the presence of legitimate legal interest in the relevant property as required under s 61(4). Following *Teh Tek Soon lwn Pendakwa Raya* [2015] MLJU 2212; [2015] 1 LNS 1504; [2015] MLRAU 433; [2015] MLRAU 433, the Court of Appeal was inclined to hold that the conditions in s 61(4) are to be read conjunctively.

[86] In addition, the Court of Appeal found that 'there is no express provision under the Act that allow the proceeds of the unlawful activity to be used for payment of legal fees' — see para 35; a position recognised by Singapore in the case of *Centillion Environment & Recycling Ltd (formerly known as Citiraya Industries Ltd) v Public Prosecutor and others and another appeal* [2013] 1 SLR 444; [2012] SGCA 65, when comparing its Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992 ('CDSA') with South Africa's Prevention of Crime Act 1998. Since the provisions of the Act are similar to Singapore's CDSA, that there was no express enabling provision for such payment, the Court of Appeal held that the High

Court erred when allowing the application for legal fees to be paid from the seized properties; that such order 'was against the intention of the legislature in enacting the Act'.

[87] According to the Court of Appeal, since the relationship between the appellant and Amar was contractual, the appellant's recourse was to take legal action against Amar for the unpaid fees under the said contract. This would be an action *in personam* and no proprietary interest can be attached to the respondent's seized properties, the proceeds of an unlawful activity. The court suggested that should a judgment be obtained against Amar for the payment of the legal fees, 'which is none in the present case', proprietary interest may be attached to the seized properties — see para 41.

[88] The Court of Appeal went on to add in fairly wide dismissive terms as follows:

> [42] In addition, if legal fees or any unpaid debt can be paid from the seized property under this Act, in particular if the debt is only based on the bill issued by the creditor, any arrangement can easily be made by the creditor and the owner of the seized property to avoid the forfeiture of the said property. This clearly, will frustrate the intention of the legislature and not in compliance with sub-s 61(4)(d) of the Act ...

[89] As for the arguments of rights under art 5(3) of the Federal Constitution are concerned, the Court of Appeal opined that those rights are not affected as legal fees can still be paid from properties which are not proceeds of an unlawful activity. The argument that art 5(3) indirectly imposed a responsibility on Amar to pay his legal fees was rejected.

ANALYSIS AND DECISION

[90] In interpreting and applying the provisions of any legislation, there must be some effort in understanding the intent and purpose of the legislation in question. That is, however, a starting point. One must then examine the scheme of the Act, read the provisions with care; reading the relevant provisions in context and against the other provisions of the Act; and against the purpose and intent of the Act. It is upon the apprehension of the relevant provisions that one then proceeds to apply the purposive rule of interpretation, to interpret the relevant provision so as to give effect or facilitate the intent of the legislation.

[91] Frequently, this rule of purposive interpretation need not be resorted to as the provisions are clear, expressed and explicit, consonant with the purpose for which the legislation was enacted; and the courts are simply interpreting the provisions in accord with the purpose of the legislation; hence the traditional rule of literal interpretation as it is difficult to say that Parliament deliberately

legislates against its own purpose of enactment. The provisions surely would have been enacted in line with that purpose; facilitating, effecting and implementing that purpose through all the provisions enacted.

[92] Another principle that is equally relevant if not more important is the principle of presumed constitutionality of the provisions of the Act, and the Act itself; that Parliament will not abuse its legislative powers and enact laws which are unjust, offend the provisions of the Federal Constitution and are contrary to the rule of law. The law that is enacted is presumed to be consonant with the rights and principles in the Federal Constitution, that those rights are very much alive, available and not rendered illusory — see *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697; [1992] 1 CLJ Rep 72; *Pesurohjaya Ibu Kota Kuala Lumpur v Public Trustee & Ors* [1971] 2 MLJ 30 *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751; [2015] 8 CLJ 921; [2015] 6 AMR 338; *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12; [2017] 4 CLJ 41; [2017] 3 AMR 164; and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780; [2019] 3 AMR 101. These principles are actually evident in the various provisions in this Act; the challenge is to recognise and give effect to them.

Scheme of the Act

[93] In the case of the present Act, one begins with an appreciation that it is a piece of legislation which is quite a mouthful, covering anti-money laundering, anti-terrorism financing and proceeds of unlawful activities. As expressed in its long title, it is 'an Act to provide for the offence of money laundering, the measures to be taken for the prevention of money laundering and terrorism financing offences and to provide for the forfeiture of property involved in or derived from money laundering and terrorism financing offences, as well as terrorist property, proceeds of an unlawful activity and instrumentalities of an offence, and for matters incidental thereto and connected therewith'. There are seven Parts to this Act, with new Parts IVA and VIA added vide Act A1467 with effect from 1 September 2014 and Act A1208 with effect from 6 March 2007 respectively.

[94] After the Preliminary matters in Part I, there is Part II which creates the offence of money laundering. Parts III, IV and IVA next provide for the measures to be taken for the prevention of money laundering and terrorism financing offences through financial intelligence, reporting obligations, legislating on cross border movements of cash and bearer negotiable instruments; and of course, the power to investigate into all these matters thus far identified.

[95] What is of particular relevance in this appeal is Part VI which provides for the freezing, seizure and forfeiture of property involved in or derived from money laundering and terrorism financing offences, terrorist property, proceeds of unlawful activity and instrumentalities of an offence under the Act. I will deal with these provisions in greater detail shortly. But for now, there are Parts VIA and VII dealing with suppression of terrorism financing offences and freezing, seizure and forfeiture of terrorist property; and other miscellaneous matters.

[96] Section 4 creates the offence of money laundering. A person commits a money laundering offence if such person, inter alia, engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence; or acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence.

[97] The terms 'proceeds of an unlawful activity'; 'unlawful activity'; and 'instrumentalities of an offence' and several other terms found in the definitions themselves which are relevant in this appeal, are defined in s 3, as follows:

> 'proceeds of an unlawful activity' means any property, or any economic advantage or economic gain from such property, within or outside Malaysia —
>
> (a) which is wholly or partly —
>
> (i) derived or obtained, directly or indirectly, by any person from any unlawful activity;
>
> (ii) derived or obtained from a disposal or other dealings with the property referred to in subparagraph (i); or
>
> (iii) acquired using the property derived or obtained by any person through any disposal or other dealings referred to in subparagraph (i) or (ii); or
>
> (b) which, wholly or partly, due to any circumstances such as its nature, value, location or place of discovery, or to the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in subparagraph (a)(i), (ii) or (iii), can be reasonably believed to be property falling within the scope of subparagraph (a) (i), (ii) or (iii);
>
> 'unlawful activity' means —
>
> (a) any activity which constitutes any serious offence or any foreign serious offence; or
>
> (b) any activity which is of such a nature, or occurs in such circumstances, that it results in or leads to the commission of any serious offence or any foreign serious offence,

(c) regardless whether such activity wholly or partly, takes place within or outside Malaysia;

'instrumentalities of an offence' means —

(a) any thing which is used in, or in connection with, the commission of any unlawful activity;

(b) any property which is wholly or partly used in, or in connection with, the commission of any unlawful activity;

'thing' includes material; 'property' means —

(a) assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, however acquired;

(b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including currency, bank credits, deposits and other financial resources, traveller's cheques, bank cheques, money orders, capital market products, drafts and letters of credit;

[98] Aside from an observation that these are definitions are couched in wide expansive terms, I shall delve no further as these matters are not in contention in this appeal but are highlighted as these terms appear in the provisions that are under the scrutiny. In any case, the focus in this appeal is on the forfeiture of the properties and not about the legality of the forfeiture or even the seizure of the properties.

Seizure of properties

[99] In order to properly deal with the appellant's appeal, one must appreciate how the properties came to be seized in the first place. The seizure of the properties has every bearing on the disposal of the forfeiture application by the PP.

[100] As set out in para 9 above, five properties were seized comprising movables and immovables. Hence, the deployment of s 45(1) in respect of the car; s 50(1) in respect of the three bank accounts and, s 51(1) in respect of the apartment.

[101] When these three provisions are examined, it will be noticed that the terms are slightly but materially different. In the case of the car, the seizure is made during the investigation process, by the investigating officer. For such a seizure, s 45(2) requires a list of all movable property seized and of the places where the movable property was found 'shall be prepared by the investigating officer' and a copy of the list 'shall be served as soon as possible on the owner of such property or on the person from whom the property is seized — see s 45(3).

A The notice is not required in the circumstances mentioned in s 45(4), that is where the property is in the possession, custody or control of a financial institution.

B **[102]** As for the bank accounts, these were monies held by or at various financial institutions as defined in s 3. The seizures of these accounts were at the behest of the public prosecutor. Section 50(1) requires the PP to be 'satisfied on information given to him by an investigating officer that any movable property or any accretion to it' is of the nature or character described in s 50(1)(a)–(d) that is:

C

(a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

(b) terrorist property;

D (c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence.

[103] Upon being so satisfied, the PP then 'by order direct that such movable E property or any accretion to it in the financial institution be seized by the investigating officer or by order direct the financial institution not to part with, deal in or otherwise dispose of such movable property or any accretion to it, in whole or in part, until the order is varied or revoked'. A seizure under s 50(1) requires Bank Negara, the Securities Commission or the Labuan Financial F Services Authority to be notified — see s 50(1A).

[104] A similar provision may be found in s 51(1) with regard the apartment, an immovable property. The difference however, is this — since subject matter is an apartment, s 51(1A) requires a copy of the notice of seizure to be served as G follows:

(a) on the owner or person in possession, custody or control of the immovable property, if known;

H (b) posting a copy of the notice at a conspicuous place on the immovable property; and

(c) serving a copy of the Notice on the Land Administrator or the Registrar of Titles or on the Collector of Land Revenue, Director of Lands and Surveys, depending on the location of the immovable property, who I must then immediately endorse the terms of the Notice on the document of title in the Register.

[105] It can thus be seen that the properties in question were seized under different circumstances, and that different people would have been notified. As

will be seen, this accounts for the use of different terms to describe these persons during the exercise of forfeiture of these properties.

Forfeiture of properties

[106] It is worthwhile noting that not all seized properties end up being forfeited. Section 60 provides for the release of the property seized if the PP is satisfied that such property is not liable to be forfeited:

> 60 Release of property seized
>
> (1) Where property has been seized under this Act, an investigating officer other than the investigating officer who effected the seizure, may at any time before it is forfeited under this Act, with the consent of the Public Prosecutor release such property to such person as the Public Prosecutor determines to be lawfully entitled to the property if the Public Prosecutor is satisfied that such property is not liable to forfeiture under this Act or otherwise required for the purpose of any proceedings under the Act, or for the purpose of any prosecution under any other law, and in such event neither the officer effecting the seizure, nor the Federal Government, or any person acting on behalf of the Federal Government, shall be liable to any proceedings by any person if the seizure and release had been effected in good faith.
>
> (2) The officer effecting any release of any property under subsection (1) shall make a record in writing in respect of such release, specifying in the record in detail the circumstances of, and the reason for, such release, and he shall send a copy of such record to the Public Prosecutor.
>
> (3) For the purpose of subsection (1), the Public Prosecutor may give any direction of an ancillary or consequential nature, or which may be necessary, for giving effect to, or for the carrying out of, such release of property.

[107] The power to forfeit seized properties is also not dependent on there being a prosecution for an offence under the Act. While s 55 deals with forfeiture where there is prosecution of the offence under the Act, s 56 deals with forfeiture where there is none. And, this is what happened in the instant appeal.

[108] Where the PP is looking to forfeit the properties seized, there is a time prescription on when the application for such forfeiture must be made; it must be made within twelve months from the date of the seizure — see ss 52A and 56(1). If there was a freezing order on the properties made under s 44 and where the person against whom the order was made has not been charged for an offence under the Act, the twelve months runs from the date of such order. Otherwise, the seizure order will cease to have effect and the seized properties must be released to the person[s] from whom such properties were seized — see

s 56(3):

> (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

[109] This makes good sense since no person may be deprived of property save as in accordance with law, as provided in art 13 of The Federal Constitution. And, the law here expressly requires the release or what is in essence, a return of the property from whom it was seized.

[110] Where the PP decides to apply for a forfeiture in the case of no prosecution, s 56(1) requires the PP to, first of all, be satisfied that such property is within the terms of s 56(1)(a) to (d):

> 56 Forfeiture of property where there is no prosecution.
>
> (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is —
>
> (a) the subject-matter or evidence relating to the commission of such offence;
>
> (b) terrorist property;
>
> (c) the proceeds of an unlawful activity; or
>
> (d) the instrumentalities of an offence.

[111] The basis for the seizure of the five properties here was that these properties were 'proceeds of an unlawful activity', that is, s 56(1)(c). Despite the presence of the word 'shall', the power to forfeit is discretionary. This is because s 56(2) requires the High Court judge to be similarly satisfied that the basis for forfeiture exists before ordering the properties to be forfeited:

> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —
>
> (a) that the property is —
>
> (i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (ii) terrorist property;
>
> (iii) the proceeds of an unlawful activity; or
>
> (iv) the instrumentalities of an offence;

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

[112] Further, s 56(4) expressly provides that the determination of the application for forfeiture shall be on the standard applied in civil proceedings, that is, on a balance of probabilities:

(4) In determining whether the property is —

(a) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence,

the court shall apply the standard of proof required in civil proceedings.

[113] Again, this makes sense as the subject matter of the proceedings in court is not a criminal charge but whether certain seized properties considered to be of the character or tainted in the manner claimed by the PP, may be forfeited. In dealing with this issue, subject to the interpretation of s 61 as expressed in the subsequent paragraphs in this judgment, the question of legitimate or bona fide ownership, right or interest of any person to that property needs to be addressed and proved on a balance of probabilities. These questions will involve findings of fact and again, s 70 of the Act provides for a determination on a balance of probabilities. This aspect was extensively discussed by the Federal Court in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors* [2021] 2 MLJ 469; [2021] 3 CLJ 198; [2021] 2 AMR 113.

Bona fide third parties

[114] In considering whether or not to grant the order of forfeiture, the High Court is mandatorily obliged under s 61(1) to cause to be published a notice in the Gazette 'calling upon any third party who claims to have any interest in the property to attend before the Court on the date specified in the notice to show cause as to why the property shall not be forfeited'. This is regardless whether there is prosecution for an offence under the Act – see ss 55(1) and 56(1). This is how the appellant and Public Islamic Bank Bhd came to be parties in the forfeiture proceedings; they responded to the Notice published in the *Gazette*.

[115] However, it must not be overlooked that the forfeiture proceedings are principally between the PP and the accused, Amar, as s 61 is only engaged where there are third parties laying some claim or interest in the properties seized. If there are none, the proceedings will proceed only between these two

key players. This position must be properly appreciated because it appears to have been overlooked simply because the two applications, by PP and by the third parties, were heard together. Hence, in the proceedings at the High Court, affidavits were filed by Amar in protest of the forfeiture orders sought by the PP.

[116] I pause here to make this observation. As pointed out a moment ago, the PP must satisfy the High Court that the property is of any of the character or nature prescribed in s 56(1)(a) to (d). It is only upon satisfying the High Court that the property is liable to be forfeited and thereafter, the High Court deals with the rights or interests of any third parties. As held in *Public Prosecutor v Kuala Dimensi Sdn Bhd & Ors*, s 56 does not absolve the PP from proving on a balance of probabilities that the properties seized come under the purview of the Act and were procured or are the proceeds of an unlawful or illegal activity. The PP must prove on a balance of probabilities that the properties seized were procured in connection with the commission of the predicate offence or are of the character for which the order for seizure was issued. See also *Public Prosecutor v Billion Nova Sdn Bhd & Ors* [2016] MLJU 1823; [2016] 2 CLJ 763; [2016] AMEJ 0162.

[117] It is important to appreciate this because this points to who bears the burden of proof; that it is upon the prosecution to establish its case on the nature or character of the seized properties within s 56(1)(a) to (d). Should the PP fail to so satisfy the High Court, then the properties are simply not liable to be forfeited. I make this observation because there does not appear to be any finding in this regard by the learned judge. This is exacerbated by the apparent absence of an order of forfeiture of the remaining properties. Although the Court of Appeal makes this finding, which it is entitled to do, the order of the Court of Appeal similarly does not proceed to order any forfeiture of those other remaining properties; it was only in respect of the monies released to the appellant. I make this observation to remind the importance of adhering to the comprehensive procedure on forfeiture under the Act in light of art 13 of the Federal Constitution.

[118] Section 61 concerns rights and interests of third parties:

> 61 Bona fide third parties
>
> (1) The provisions in this Part shall apply without prejudice to the rights of bona fide third parties.
>
> (2) The court making the order of forfeiture under subsection 28L(1) or section 55 or the judge to whom an application is made under subsection 28L(2) or 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that —

(a) the claimant has a legitimate legal interest in the property;

(b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or Part IVA or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;

(c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;

(d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and

(e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

[119] At this point, the High Court is already satisfied that the seized properties are of the nature and character claimed by the PP, despite the protestations of Amar. However, the existence of s 61 means that the court cannot proceed to order a forfeiture until and unless third party rights, interests or claims are determined. The fact that there is express provision in s 61 shows the clear intent of Parliament to ensure that the rights, interests or claims of bona fide third parties are addressed and not adversely compromised before any forfeiture is ordered. To say that the purpose of the Act is to forfeit properties which are proceeds of unlawful activity and say that persons such as the appellant are therefore not entitled to their interests or rights because of that purpose is to deprive or deny these bona fide third parties of their larger and wider interests under art 13 read with art 5 of the Federal Constitution in this case. Such an approach regrettably will give s 61 a literal reading which flies in the face of the intent and purpose of the Act. Put another way, s 61 is specifically enacted to provide for non-forfeiture or return properties to bona fide third parties despite such properties being proven to be proceeds of unlawful activity. Such release does not in the least, run contrary to the purpose of the Act.

[120] As for the conditions in s 61(4), thus far, the authorities have taken the view that the conditions in s 61(4)(a) to (e) are read cumulatively, that all conditions must be met before a third party may successfully stake any interest in the seized property and reclaim such property: see *EL Chong Motor Trading Sdn Bhd (pihak ketiga yang menuntut) lwn Pendakwa Raya* [2017] 11 MLJ 793; [2017] 3 CLJ 592, *Pendakwa Raya lwn Raja Noor Asma bt Raja*

Harun [2013] 9 MLJ 181; [2013] 5 CLJ 656 and *Public Prosecutor v Lau Kwai Thong* MTSA Case No 44–20 of 2008 (unreported); and *Teh Tek Soon lwn Pendakwa Raya*.

[121] In my view, the requirements or conditions of s 61(4) only apply where the third party is claiming for a return of the seized property; those requirements do not apply where the third party is showing cause as to why the property shall not be forfeited. This is evident from a careful reading of s 61 itself and also from an appreciation of how the properties were seized in the first place. I have already discussed the latter though I will reemphasise some of the salient aspects shortly.

[122] Any third party who protests the forfeiture of any seized property must first, prove that he or she is a bona fide third party — see s 61(2) and (3). The lack of good faith will immediately deprive the third party as to the availability of s 61. Section 61(3) further provides that a third party's lack of good faith may be inferred from the objective circumstances of the case. This is a question of evaluation of the facts and evidence led by the third party in order to establish his claim, interest, right or protestation to the forfeiture.

[123] In this appeal, the appellant was and is entirely a bona fides third party with interest in the property. It has perfectly valid, legal and real interests which are entirely legitimate. What was grossly overlooked by the Court of Appeal in this appeal is the fact that the bona fides of the appellant was actually not challenged. On the contrary, it may be readily inferred that the PP and also the High Court accepted that the appellant and its legal services were indeed rendered and rendered completely in good faith. Further, the sum for which the appellant was claiming interest in, that is, RM398,722 was also not in issue.

[124] The invoices raised at the material time throughout the conduct of the Amar's case, from the time of his arrest, remand extension application; detention and inquiry; and subsequent habeas corpus proceedings, were all exhibited in the affidavit filed by the appellant towards the hearing of its challenge under s 61 and these documents were not challenged by the PP — see paras 16 and 34 of the High Court grounds. RM25,000 of the legal fees had already been paid, leaving a balance sum of RM398,722. I do not see any rebuttal evidence from the PP. The affidavits filed in reply by the PP were only in response to Amar's protestations of innocence and challenge to the forfeiture. In any case, from the narrative set out in the earlier part of this judgment, it is evident that the appellant did render the legal services for which it invoiced Amar.

[125] Thus, when the Court of Appeal said at para 9 of its grounds that the PP had raised only one issue, 'that the intervener has failed to fulfil the requirement

of s 61(4) of the Act to qualify as the bona fide third party which entitled the intervener to be paid the respondent's legal fees from the respondent's seized properties', it was in fact in error. One arguably may be bona fides in conduct and still fail to meet the requirements of s 61(4), assuming those requirements apply insofar as this appellant is concerned. I say so because s 61(3) talks about inference by the court or an enforcement agency, on the element of good faith, 'from the objective circumstances of the case'; whereas s 61(4) deals with the return of the properties where a claimant can prove and satisfy the court on a balance of probabilities, the five requirements set out therein. For instance, the presence of good faith cannot salvage the inability to establish legitimate legal interest in property, a requirement in s 61(4)(a).

[126] This point becomes clearer when we examine s 61 more carefully.

[127] In s 61(1), the notice that is caused by the court to be published in the *Gazette* invites any third party 'who claims to have any interest in the property' to attend court 'to show cause as to why the property shall not be forfeited'. A third party must thus claim to have an interest in the seized property. Here, the appellant claimed to have an interest having being told by its client to wait for its payment as the monies in the bank accounts had been seized.

[128] The term 'interest' is not defined under the Act; neither is the term 'rights'; and s 61(1) provides that the provisions in this Part 'shall apply without prejudice to the rights of bona fide third parties'. I find it incongruous to on the other one hand say, as the Court of Appeal did, agreeing with the PP that the appellant is not a bona fide third party, and yet suggest that the appellant may make its claim against Amar for unpaid legal services as an action in personam with no proprietary interest attached to the properties — see para 41.

[129] More so when the Court of Appeal speculated and agreed with the suggestion of the PP that 'if legal fees or any unpaid debt can be paid from seized property under this Act, in particular if the debt is only based on the bill issued by the creditor, arrangement can easily be made by the creditor and the owner of the seized property to avoid the forfeiture of the said property, this clearly, will frustrate the intention of the legislature and not in compliance with sub-s 61(4)(d) of the Act ...'. Not only is there no basis, the suggestion is speculative, spurious, unwarranted and highly irresponsible coming from the office of the PP. Bearing in mind that the integrity of the invoices or bills issued by the appellant were not challenged at all by the PP with the presence of clear proof that the appellant did indeed render legal services and did in fact represent Amar in the various proceedings, it is not at all open to PP to make such a suggestion. The PP should have objected to the integrity of the invoices and various correspondence between the appellant and Amar but it did not. It was certainly too late in the day for the PP to make any suggestion questioning

those invoices and services rendered. Unfortunately, this was not picked up by the Court of Appeal unlike the High Court.

[130] Further, it is erroneous to say that the courts cannot recognise the interests of the appellant as a bona fide third party just because there are no express terms in s 61. The same may be said about there being no express terms prohibiting the recognition of such interests. If courts can only function and decide where there are express terms, the role of judges would be reduced to being purely perfunctory and robotic. In today's age, even Artificial Intelligence (AI) invented can do better than that.

[131] The appellant, as legal counsel and officer of the court are sentinels in the administration of justice while the courts are the last bastion at the seat of justice. It is precisely in recognition of the skill, power and wisdom of judicial discretion that the law has provided in ss 56 and 61 the appropriate judicial power to decide whether the order of forfeiture ought to be granted. Judges are expected to be properly satisfied on the terms specified in the relevant provisions; be discerning, able to sieve through facts or alleged facts, opinions, suggestions, submissions and a trove of case law; balance competing arguments and see the ultimate picture in order to render justice as envisaged by the law. It is never the role or function of the courts to embark on journeys of speculation.

[132] Consequently, recognising that third parties may comprise of all sorts of claimants, Parliament has appropriately described them as third parties. Understanding that these third parties may present discrete rights, interests and claims on any number of reasons or basis, s 61(2) and (4) have been appropriately provided, to cater for such scenarios.

[133] What is even more troubling is that the Court of Appeal did not explain why or how the High Court had erred in its finding of fact that there was present, bona fides on the part of the appellant. What may be inferred from the Court of Appeal's grounds is that since the discussion was only on s 61(4)(a), that the words 'legitimate legal interest' are not defined in the Act but the term 'imports contradictory interpretation by parties involved as happened in this case'. For that reason, the Court of Appeal applied the purposive approach of interpretation, that 'no one should enjoy the proceeds of an unlawful property' with the added reason of absence of express provision allowing for such payment, to hold that the appellant 'cannot be paid from his seized properties and the intervener has no legitimate legal interest in the property' — see paras 35 and 43.

[134] Now, a careful reading of the whole s 61 will show that the conditions or requirements in s 61(4) apply only where the third party is claiming for a return

of the seized property. This is obvious from the words in s 61(4) itself — that the court or enforcement agency 'shall return the property to the claimant'. Given what was earlier explained as to how different properties may come to be seized and the persons who must be notified, it is no surprise then that these third party claimants may be claiming for a return of the seized property. Logically, seized properties should only be returned to the person from whom it was seized, though there may be a person other than such a person who is claiming for its return. The appellant is not claiming for a return of any of the seized properties. It is merely showing cause as to why the forfeiture should not be ordered. In this regard, I must add that I am not addressing the interests or claims of Public Islamic Bank Bhd; that is not the subject of appeal.

[135] Where a third party is claiming for a return of the property seized, the five conditions set out in s 61(4) must be fulfilled. As opined, the same cannot be said about the appellant third party who is not and cannot be claiming for a return of any of the seized properties as these properties were never seized from them. All that a third party such as the appellant is required to establish is to 'show cause as to why the property shall not be forfeited'. The appellant, as such a third party, must do so on a balance of probabilities. Here, I am amply satisfied that the appellant has met that burden and has shown cause why the sum of RM398,722 should not be forfeited. The appellant third party was not asking for a return of the sum of RM398,722. Were that the case, then the appellant's case would have taken an entirely different turn and it would have had to meet the conditions in s 61(4).

[136] However, the appellant third party, like any other third party is not required to inquire from Amar, his client, the source of payment; even less the legality of his sources before agreeing to provide legal representation and services. Should that be required to be asked from a person arrested before any trade or service is rendered to such a person, subject to the element of bona fides, no one would ever provide trade, services or the like to such an arrestee; and no tradesman, professional or servicemen would ever be paid. That would include the contractor repairing a roof or any repair work for the arrestee, or even the newspaper vendor; just to illustrate the breadth of who a potential third party may be.

[137] It is for this reason that the third party is not defined, that it is for such persons to prove bona fides and to show cause why the forfeiture should not take place. Such third parties must lead evidence to prove these matters and it is for the court to be properly satisfied. The presence of s 61(2) and (3) is to protect innocent third parties who should not be deprived of payment or property.

[138] Further, where properties are frozen by an enforcement agency,

s 44(3)(c) provides for the disposal of properties of monies for the payment of legal expenses, described as 'payment of the costs of that person to defend criminal proceedings against him'. 'Enforcement agency' is defined in s 3 as including 'a body or agency that is for the time being responsible in Malaysia for the enforcement of laws relating to the prevention, detection and investigation of any serious offence'. This would include the police force. Since there is provision for properties which are frozen to be disposed of in order to pay legal fees, I cannot see why those legal expenses cannot be claimed and paid up from seized properties when forfeiture is initiated, especially where the basis for freezing, seizure and forfeiture are the same, that is, proceeds of unlawful activity — see sections 44(1)(b)(ii), 45(1), 50(1)(c), 51(1)(c) and 56(1)(c).

[139] In fact, there is an unusual reference to 'enforcement agency' in s 61(4) when the enforcement agency really has no role to play in the forfeiture proceedings. The only entity that should be properly satisfied as to the conditions in s 61(4) is the court and not the enforcement agency as the power to forfeit lies with the court and not the enforcement agency. Section 61 is expressly referred to in ss 28L(1), 55(1) and 56(1) and no other. Section 61 could be better drafted but until that is done by Parliament, any ambiguity must be read in the manner set out above.

[140] Finally, I turn to the further reason articulated by learned counsel for the appellant to which I fully agree. Amar is entitled to legal representation of his choice as guaranteed under art 5 of the Federal Constitution. This fundamental principle is not disputed by the PP and it was recognised by the Court of Appeal. This was the basis upon which the High Court further recognised the appellant's interest. The High Court cited a decision of the Court of Appeal *Md Sukri bin Shahudin lain-lain lwn Pendakwa Raya* Criminal Appeal No W-09–432–11 of 2016 (unreported) in support. Although there were no written grounds, the High Court chose to abide by that decision in view of the doctrine of stare decisis. His Lordship was also assisted by the learned Senior Federal Counsel who confirmed that the facts in that decision were similar to the case before the High Court. In my view, the High Court was perfectly entitled to do precisely that given the circumstances.

[141] In any event, the argument under art 5 of the Federal Constitution has much force and merit. Even with a wide and liberal reading which is how the Federal Constitution must be read and interpreted, it cannot be said nor can it ever be the interpretation of art 5 that legal representation to an accused must be rendered pro bono and that any counsel providing such legal services cannot and will not be paid should his client's monies lie in accounts frozen or seized, liable to be forfeited. If that be the case, with no disrespect to the legal fraternity, I can immediately see there will be many either reluctant or hesitant lawyer, prepared to step forward to provide such necessary and vital legal

representation. The reading by the Court of Appeal, in my view, is in essence literal without examining the whole purport of the Act; resulting in the guaranteed rights in Part II of the Federal Constitution, quite illusory to the accused, Amar. Unless voluntarily waived, there is an implied obligation to pay for such legal services and the counsel representing an accused in the circumstances of Amar has every legitimate expectation to be remunerated. Even an officer of the court appointed by the court where an accused is unable to afford his own counsel, is paid from the public purse. What more the case of Amar's counsel of his choice, the appellant.

[142] To a larger but no less important extent, the reading by the Court of Appeal has also gravely and adversely affected the rights of the appellant to a meaningful livelihood; that its legal representation of Amar will not and cannot receive remuneration. There are abundant pronouncements of this Apex Court on the care that must be taken when reading any statute so as to avoid such an outcome; starting with the decision in *Dewan Undangan Negeri Kelantan v Nordin bin Salleh*; *Public Prosecutor v Azmi bin Sharom*; and the recent decision in *Alma Nudo Atenza v Public Prosecutor and another appeal*.

[143] Further, it cannot be right that just because s 61(1) reserves the other rights of third parties to sue upon any contractual relationship or take any other alternative remedy that such third parties are then said to be not bona fides. That reading and construction of s 61 by the Court of Appeal does not accord with constitutional legality and is more literal than it is in pursuance of the purpose of the Act. I do not find that the Act ever intended that third parties who are lawyers similarly circumstanced as the appellant can never be paid their legal fees. Further, from the narrative set out earlier and from the appeal records, the legal services commenced even before the first order for seizure was made — see p 535 *Record of Appeal Jld 4(3)*.

CONCLUSION

[144] For all these reasons carefully explained above, I find the appellant a bona fide third party who has successfully shown cause as to why its interest of RM398,722 in the seized properties should not be forfeited. The appeal of the appellant is therefore allowed and the decision of the Court of Appeal is set aside. The order of the High Court is further reinstated.

Appeal dismissed.

Reported by Ahmad Ismail